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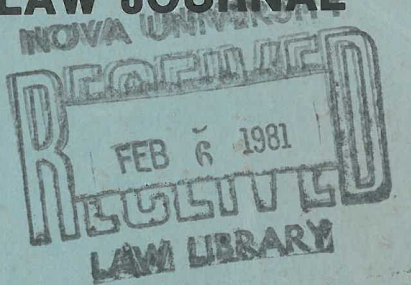
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NOTE

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CASE COMMENTS

Coast Guard Authority On The High Seas.
Exclusionary Rule.
Drug Courier Profiles.

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When, If Ever, Should Trials Be Held Behind Closed Doors?

The Honorable Justice Joseph A. Boyd, Jr.,*
and
Paul A. Lehrman**

“One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of justice is fair and right.”¹ — Justice Felix Frankfurter

In *Gannett Co. v. DePasquale*,² Justice Stewart framed the issue before the United States Supreme Court as follows: “[W]hether members of the public have an independent constitutional right [under the sixth amendment] to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.”³

In its narrowest sense, *Gannett* dealt with the constitutionality of the closure of a pretrial suppression hearing. While attempting to limit its decision to the facts before it, the Court spoke no less than twelve times of a general public right of access to criminal *trials*.⁴ For exam-

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The authors thank Whitney Strickland, who is a research assistant to the First District Court of Appeal, for his assistance in the preparation of this article.

1. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of cert.), cited in *Richmond Newspapers, Inc. v. Virginia*, — U.S. —, 100 S.Ct. 2814, 2826 n.9 (1980).

2. 443 U.S. 368 (1979).

3. *Id.* at 370.

4. See Justice Blackmun's concurrence in *Richmond Newspapers*, — U.S. at —, 100 S.Ct. at 2841.

ple, at one point Justice Stewart wrote: "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; [the sixth amendment] guarantee, like the others enumerated, is personal to the accused."⁵

The Court's frequent use of inconsistent language and Justice Rehnquist's concurrence, stating that the *first amendment* provided no enforceable right to open governmental proceedings,⁶ led to considerable confusion among commentators and members of the media.⁷ One headline appearing in a national legal newspaper summed up best the ambiguity surrounding the Court's holding—"Gannett Means What It Says; But Who Knows What It Says?"⁸

Faced with this muddle, the Supreme Court recently decided to reconsider *Gannett*. In *Richmond Newspapers, Inc. v. Virginia*,⁹ the Court addressed the question of whether the first amendment,¹⁰ as opposed to the sixth amendment, guaranteed the public and press the right to attend a criminal trial.¹¹

5. 443 U.S. at 380, quoting Justice Blackmun's dissent in *Faretta v. California*, 422 U.S. 806, 848 (1975).

6. "Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings." 443 U.S. at 404 (Rehnquist, J., concurring) (citations omitted). See also *Richmond Newspapers, Inc. v. Virginia*, — U.S. —, 100 S.Ct. 2814, 2843 (Rehnquist, J., dissenting).

7. The Birmingham Post-Herald, Aug. 14, 1979, at A-4, termed the decision "cloudy." The Chicago Sun-Times, Sept. 20, 1979, at 5 (cartoon), labeled the *Gannett* decision "confused." See also Note, *Freedom of Expression and the Media*, 7 HAST. CONST. L.Q. 338 (Winter 1980).

8. Nat'l L. J., October 15, 1979, at 20.

9. — U.S. —, 100 S. Ct. 2814 (1980).

10. One distinguished litigator stated that *Richmond Newspapers* is "one of the two or three most important decisions in the whole history of the First Amendment." *Richmond Decision Seen as Having Major Effect*, 6 MED. L. REP. 11 (July 15, 1980), quoting Dan Paul.

11. Compare Mr. Justice White's concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, "This case would have been unnecessary had *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances." — U.S. at —, 100 S. Ct. at 2830, with Mr. Justice Rehnquist's concurring opinion in *Gannett*, note 6 *supra*, and Mr. Justice Rehnquist's dissent in *Richmond Newspapers, Inc. v. Virginia*, "I do not believe that either the First or Sixth Amendments, as made applica-

The facts of the *Richmond Newspapers* case are simple. Upon the unopposed motion of defense counsel to close to the public the fourth murder trial of the defendant, the judge barred the public and press from the courtroom.¹²

Later that same day, appellants, two reporters for appellant Richmond Newspapers, sought a hearing on a motion to vacate the closure order. They maintained that the Constitution prohibited such an order absent a finding that closure was the only way to preserve the fair trial rights of the defendant. The court disagreed, and the Supreme Court of Virginia, finding no reversible error, denied Richmond Newspapers' petition for appeal from the closure order.

In reviewing the case,¹³ the Supreme Court recognized that the

ble to the States by the Fourteenth, require that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands." — U.S. at —, 100 S. Ct. at 2843. Justice Blackmun continues to maintain the right to a public trial is found in the sixth amendment. — U.S. at —, 100 S. Ct. at 2842. Nevertheless, he accepted the ultimate ruling in *Richmond Newspapers*, although he pointed out the Court erred in its analysis of *Gannett*. — U.S. at —, 100 S. Ct. at 2842 n. 3.

12. In March 11, 1976, the defendant, Mr. Stevenson, was indicted for murder. Stevenson was subsequently found guilty. On appeal, the Virginia Supreme Court reversed the conviction based upon the introduction of inadmissible evidence. Stevenson's second and third trials ended in mistrials. In the second trial, a juror was excused after trial had begun and no alternative juror was available. In the third trial, it was alleged that a prospective juror had read newspaper accounts of Stevenson's previous trials and had told other prospective jurors of the events surrounding the previous cases. Prior to Stevenson's fourth trial in the same court, his counsel moved to close the courtroom to the public. The prosecution offered no objection. The trial judge granted the motion, citing to a Virginia statute (VA. CODE § 19.2-266) that a court "may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the rights of the accused to a public trial shall not be violated." See — U.S. at —, 100 S.Ct. at 2818; Nat'l L. J., Sept. 26, 1980, at 26.

13. In deciding to hear the case, the Supreme Court determined that the question of jurisdiction would be postponed until hearing the case on the merits. 444 U.S. 89 (1979). At oral argument, the State of Virginia contended that because the Virginia statute authorizing closure had not been ruled on by the Virginia State Supreme Court, the Supreme Court lacked appellate or certiorari jurisdiction. In opposition, Richmond Newspapers, represented by constitutional law professor Laurence Tribe, asserted that the Virginia closure statute was invalid "as construed and enforced, and this is enough for jurisdiction." 48 U.S.L.W. 3550 (Feb. 26, 1980). From this, the Court treated the

conflict between publicity and the due process guarantees of the defendant is "almost as old as the Republic."¹⁴ The Court's analysis began at once with the following treatment of *Gannett*:

In Gannett Co., Inc. v. DePasquale, the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor press an enforceable right of access to a *pre* trial suppression hearing.¹⁵

After reviewing abundant historical evidence showing criminal trials both here and in England were presumptively open and considering the first amendment interest in the public's right to know, the Court concluded: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."¹⁶

The majority based its conclusion on a number of persuasive reasons, all interrelated with one central theme; that is, open justice secures public confidence in the judicial system.

The decision in *Richmond Newspapers* is important for two reasons. First, the Court's attempt to distinguish *Gannett* on its facts should resolve some of the uncertainty clouding that opinion's true meaning. Second, a natural extension of the underlying rationale enunciated in *Richmond Newspapers* could and should persuade courts to open the doors to pretrial activity to the press and public.

Justice Brennan in *Richmond Newspapers* offered an additional explanation why public access to criminal proceedings deserves constitutional protection. In his concurring opinion, Justice Brennan noted:

Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role

filed papers as a petition for a writ of certiorari, which was granted. — U.S. —, 100 S.Ct. 2814, 2820.

14. — U.S. at —, 100 S. Ct. at 2821, quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

15. — U.S. at —, 100 S. Ct. at 2821.

16. *Id.* at —, 100 S. Ct. at 2830. Justice Burger's opinion, joined by Justices White and Stevens, went on to observe the right of access is not absolute. Reasonable time, place and manner restraints are permissible. *Id.* at —, 100 S. Ct. at 2830 n.18.

in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.¹⁷

Publicity during pretrial activity in criminal cases also would promote these objectives.¹⁸ The same analysis should apply as well in civil litigation.¹⁹ A defendant's fate so often depends upon what goes on inside preliminary hearings. The presence of the public at these proceedings would insure that justice is administered from the day the judicial process begins.²⁰

Just how will *Gannett* and *Richmond Newspapers* influence the judicial process in Florida? Decisions dealing with the subject long ago

17. *Id.* at —, 100 S. Ct. at 2937 (Brennan, J., concurring).

18. "Without publicity, all other checks are insufficient: in comparison to publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827), cited in — U.S. at —, 100 S. Ct. 2824 (Brennan, J., concurring).

19. One commentator cites well-respected N.Y. Times columnist Anthony Lewis as suggesting that the *Richmond Newspaper* doctrine regarding open criminal trials also applies to civil proceedings. Winter, *Richmond Case Widens Access, Spawns Doubts*, 66 A.B.A. J. 946 (Aug. 1980). The Supreme Court in *Richmond Newspapers* did not directly address this issue. See — U.S. at —, 100 S. Ct. at 2829 n. 17, 2830 n. 18. In contrast, Florida courts have dealt with the issue, determining that the nature of the proceeding is immaterial. In *State ex rel Gore Newspaper Co. v. Tyson*, 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds*, 348 So. 2d 293 (Fla. 1977), the Fourth District Court of Appeal asserted in a civil proceeding that "there is no distinction between a criminal or a civil action insofar as it pertains to the exercise of the court's inherent power to control the conduct of the proceeding before it; but, whether it be a criminal or a civil proceeding this power must be exercised cautiously and only for the most cogent reasons." 313 So. 2d at 783. See, e.g., *English v. McCrary*, 348 So. 2d 293, 300, 301 (Fla. 1977) (England, J., dissenting).

20. First, it is suggested that public access to criminal and civil proceedings improves the quality of evidence by promoting a disinclination for witnesses to falsify their testimony. Furthermore, public attendance may encourage public officials, including judges, lawyers, and police officers, to be more conscientious in the performance of their respective duties. Finally, public access builds confidence in the fairness of the judicial process. See 6 WIGMORE, *EVIDENCE* 1834 (1976). Such public access, however, could jeopardize a witness' personal safety. See, e.g., *Palm Beach Newspapers, Inc. v. State*, 378 So. 2d 862 (Fla. Dist. Ct. App. 1980), in which two convicts' fear of retaliation for testifying about a prison murder was deemed insufficient cause to exclude the press.

recognized that in our state the conduct of a trial is a public matter.²¹ And, as the United States Supreme Court has noted:

A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired may report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.²²

Even though jurisdictions agree on the general desirability of open judicial proceedings, situations like that in *Gannett* create a "civil libertarians' nightmare"²³ of conflicting constitutional liberties.

But Florida case law, even pre-*Gannett*, has dealt in a logical manner with the conflict. Courts in the state have developed a balancing of interests test, applicable to both criminal and civil cases, that seeks a satisfactory compromise between the two interests. Such treatment is still valid today in a post-*Gannett* era and can provide a measure of protection for both rights when they conflict.

*State ex rel Gore Newspaper Co. v. Tyson*²⁴ provides an excellent example of how one district court of appeal coped with the problem of public access versus a fair trial of the defendant. In the majority opinion, Judge Mager of the Fourth District Court of Appeal first reiterated the basic proposition that a court has inherent power to control the conduct of the proceedings before it.²⁵ He then proposed that before a judge be permitted to close a part of a trial, he must examine the particular factual circumstances of each case and measure these factors against the various interests affected. If "*cogent reasons*"²⁶ exist to suspect the right to a fair trial may be jeopardized, the press must be excluded.

Judge Mager went on to list a number of situations which would

21. *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1976).

22. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

23. *United States v. Dickinson*, 365 F.2d 496, 499 (5th Cir. 1972).

24. 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds*, 348 So. 2d 293 (Fla. 1977).

25. *Id.* at 781.

26. *Id.* at 782.

justify a private trial. For example,

[w]here the testimony of the defendant or witnesses was of such a nature that it could not be freely and completely presented to the public without serious detrimental effects to the 'fair trial' concept . . . [or] where the nature of the testimony was such as to be offensive to younger persons . . . [or] where the lives and safety of the witnesses were involved . . . ,"²⁷ a trial may be conducted behind closed doors.

Not content with mere abstractions, Judge Mager concluded by defining the proper role of the court in and the appropriate tests for weighing these competing interests. The following guidelines apply even though the litigants, like those in *Richmond Newspapers*, prefer that the proceedings be conducted in secret. Judge Mager wrote:²⁸

1. A court's action in excluding access to the courts by the public and press is subject to review by prohibition;
2. A newspaper corporation, a newspaper reporter or a member of the public have the standing to maintain a prohibition proceeding for the purpose of enforcing the right of public access to the courts;
3. The court has inherent power to control the conduct of its own proceedings;
4. The court, under its inherent power, may for cogent reasons exclude the public and press from any judicial proceeding to protect the rights of the litigants and to otherwise further the administration of justice;
5. In determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation with those of the public and press;
6. The type of civil proceeding,²⁹ the nature of the subject matter and the status of the participants are factors to be considered when evaluating the cogent reasons for excluding the public and press from access to the courts;
7. Persons involved in civil litigation are not entitled to exclude the public and press merely because they request a closed hearing;
8. The public and press have a fundamental right of access to all judicial proceedings;
9. The court's exclusion of the public and press (and the sealing of

27. *Id.*

28. *Id.* at 787.

29. See note 19 and accompanying text *supra*.

court records) based solely upon the wishes of the parties to the litigation, absent cogent reasons for conducting a private trial, constitutes an act in excess of the power of the court.

While closing hearings from public scrutiny is not new in this state,³⁰ it is clear that a fair trial is preferred over an open hearing if the two are incompatible: "We have always held that the atmosphere essential to the preservation of a fair trial — the most fundamental of all freedoms — must be maintained at all costs."³¹

Moreover, as the decisions in *Gannett* and *Richmond Newspapers* make clear, constitutional considerations mandate closure in criminal cases where the right to a fair trial may be infringed.³² But the limitation on the public's right to know must go only so far as to protect the right to a fair trial *and no further*. In many cases, the mere sequestration of a jury or change of venue may be sufficient to protect the defendant.³³ As the Supreme Court of Florida stated in pre-*Gannett* days:

The inconvenience suffered by jurors who are sequestered to prevent exposure to excluded evidence which may be published in the press is a small price to pay for the public's right to timely knowledge of trial proceedings guaranteed by freedom of the press. It is argued that a temporary withholding of news from the public may aid in assuring a fair trial

30. *State ex rel. English v. McCrary*, 328 So.2d 257 (Fla. Dist. Ct. App. 1976), *approved*, 348 So. 2d 293 (Fla. 1977); *see also* *Sentinel Star Co. v. Booth*, 372 So. 2d 100 (Fla. Dist. Ct. App. 1979). *Miami Herald Publishing Co. v. Lewis*, 383 So. 2d 236 (Fla. Dist. Ct. App. 1980).

31. *Estes v. Texas*, 381 U.S. 532, 540 (1965), quoted in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 909 (Fla. 1977).

32. *Richmond Newspapers* held that a courtroom may be closed provided there is "an overriding interest articulated in findings." — U.S. at ___, 100 S. Ct. at 2830. Although Chief Justice Burger's opinion does not define "overriding interest," it is clear that such a test will not prevail where alternative methods — such as sequestration — protect a defendant's fair trial rights. However, because Justice Burger was joined only by Justice Stevens and to a limited degree by Justice White, there was no agreement as to the test for determining when closure is appropriate. *See, e.g.*, Justice Brennan's opinion, joined by Justice Marshall: "What countervailing interests might be sufficient to reverse this presumption of openness need not concern us now. . . ." *Id.* at 2839 (footnote omitted). *See also* Goodale, *The Three-part Open Door Test in Richmond Newspapers Case*, Nat'l L. J., Sept. 26, 1980, at 26.

33. *Shepard v. Maxwell*, 384 U.S. 333 (1968).

and that if the State and the defendant agree to muzzling the press no one else has a right to object. We firmly reject any suppression of news in a criminal trial except in those rare instances such as national security or where a news report would obviously deny a fair trial. . . .³⁴

When synthesizing these cases and harmonizing them with *Gannett* and *Richmond Newspapers*, one should apply the following thoughts and principles to any case involving a question of public access to the courtroom:

- 1) A presumption that all aspects of the trial are open to public scrutiny should govern.
- 2) In rare instances, the first amendment right of public access will conflict with the sixth amendment right to a fair trial.
- 3) In such cases, the trial judge should examine the circumstances of the case. Specifically, he or she should consider the type of case, the nature and sensitivity of the evidence, the probability of extensive press coverage, the size of the potential jury pool, and all other "cogent" factors.
- 4) The desire of the litigants to hold the proceedings in private should have no impact on the judge's decision.
- 5) If the judge decides that access should be limited, such limitation should be exercised only to the extent necessary to provide a fair trial.
- 6) Accordingly, any limitation imposed must go only so far as to protect the right to a fair trial and no further.
- 7) Only in the most extreme circumstances, in which there are no less restrictive alternatives, should access of the public be limited.
- 8) A jury should be sequestered before a decision to limit access is made. If sequestration does not prove to be sufficient, the trial judge must weigh the impact of an open trial upon the possibility of conducting a hearing that lacks fairness.

With such guidelines in effect, the rights of the litigants and the rights of the public would be best served.

As the Supreme Court of Florida noted:

Freedom of the press . . . is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself,

34. 340 So. 2d at 910.

other people, and the Nation. News delayed is news denied. To be useful to the public, news events must be reported when they occur. Whatever happens in any courtroom directly or indirectly affects all the public. To prevent star chamber injustice, the public should generally have unrestricted access to all proceedings.³⁵

In summary, the impact of *Gannett* and its progeny will be limited in this state. Florida has recognized for many years, especially with the advent of the electronic media,³⁶ that conflicts between a free dissemination of information and a fair trial will inevitably arise. Fortunately, a body of well-reasoned case law exists for perplexed judges to follow. With the two federal decisions of *Gannett* and *Richmond Newspapers* to guide the exercise of judicial power, the delicate business of balancing two of our most precious constitutional freedoms can be performed in such a way as to benefit both litigants and the public.

35. *Id.*

36. See *Chandler v. Florida*, 366 So. 2d 64 (Fla. Dist. Ct. App. 1979), *cert. denied*, 376 So.2d 76 (Fla. 1979), *prob. jur. noted*, 48 U.S.L.W. 3673 (April 22, 1980). See Smith, *Fair Trial - Free Press: The Camera in the Courtroom Dilemma Continues*, 3 NOVA L. J. 11 (1979); See also Hoyt, *Prohibiting Courtroom Photography: It's Up To The Judge In Florida and Wisconsin*, 63 JUDICATURE 290-95 (Jan. 1980). Netteburg, *Does Research Support The Estes Ban On Cameras In The Courtroom*, 63 JUDICATURE 466-75 (May 1975).

Is the Supreme Court Creating Unknown and Unknowable Law? The Insubstantial Federal Question Dismissal

Ovid C. Lewis*

United States Supreme Court Justices undoubtedly accept the prevailing notion that the American legal system functions as an instrument for attaining socially desired ends.¹ And surely they would agree with Karl Llewellyn's prescription that judges in resolving justiciable controversies ought to "see and weigh first the relevant problem-situation as a type, holding meanwhile so far as may be in suspense [their] reactions to the fireside equities or to other possibly unique attributes of the case in hand."²

Llewellyn's approach seeks to reach a just decision, reflected in an opinion articulating a rule of "singing reason."³ Stated another way, a decision should represent "both a right situation-reason and a clear scope-criterion on its face [yielding] . . . regularity, reckonability and justice."⁴

The United States Supreme Court's memorandum opinion practice fails to satisfy these ideals. To the contrary, it appears as though the Court, when summarily affirming or dismissing an appeal, follows the advice once given by Lord Mansfield to an army officer. The officer, just appointed governor of a West India island, was concerned about

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1. This is, of course, nothing new. Justice Cardozo in 1921 observed that "[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as a means adapted to an end." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98 (1921). *See also* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268 (1960).

3. *Id.* at 183.

4. *Id.*

his ability to sit as a chancellor and to decide cases. Lord Mansfield soothed the new governor's fears with this counsel:

Be of good cheer—take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently—then consider what you think justice requires, and decide accordingly. But never give your reasons;—for your judgment will probably be right, but your reasons will certainly be wrong.⁵

But justification and elaboration are expected in a mature legal system.⁶ An opinion must explicate the ratio decidendi to provide—if not a rule of “singing reason”—at least *some rule* to ensure that the Court has acted on principle rather than “fireside equities.” When the Court provides opinions demonstrating that the resolution of an issue is at least partially the product of principled⁷ and reasoned⁸ decision making, we are reassured that rules of law *do* play a role in the judicial process.

By writing opinions demonstrating that the judgment is the result of principled and reasoned decisionmaking—not a mental toss of dice—judges retain and exhibit their objectivity, enhancing the prestige of the legal process and reenforcing the consensus of legitimacy, the main source of power for courts in a strong legal system, *i.e.*, a legal system that is ‘the product of a . . . substantial consensus and . . . will-

5. 3 J. CAMPBELL, *LIVES OF THE CHIEF JUSTICES OF ENGLAND* 481 (3d ed. 1874).

6. On justification and judicial decision making, see R. WASSERSTROM, *THE JUDICIAL DECISION* 172-73 (1961).

7. “Briefly put, the requirements for principled decision are: (1) that a reason for the disposition of the case be given; and (2) that the case be so decided because it is held to be proper to decide cases of its type in this way.” Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 41 (1963).

8. “Reasoned” decision is more inclusive than decision “on principle” and has more meaning in administrative context. We forget sometimes that “arbitrary” action can be either an unjustified departure from general policy or an indiscriminating and unjust application of general policy to a concrete situation within its letter but not within its spirit.

Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 n.5 (1958).

ing obedience' rather than the product of coerced submission.⁹

Obviously, if promulgation of a rule does not occur, then law "as a guide to conduct is reduced to the level of mere futility [because] it is unknown and unknowable."¹⁰

The thesis advanced in this article is that the federal question memorandum opinion practice of the Court comes close to creating unknowable law.

A species of memorandum opinions exists that ostensibly complies with the minimum requirements of reasoned elaboration. These decisions affirm or reverse a case by merely citing a prior controlling precedent.¹¹ The Court has indicated that these determinations are on the merits, unlike denials of certiorari, and thus binding on lower courts.¹² In fact, the Court itself sometimes cites these summary dispositions as authority.¹³ More often, however, such decisions simply are ignored. The Court's summary affirmance in *Adams Newark Theater Co. v. City of Newark*¹⁴ illustrates the lack of respect accorded to such memorandum opinions.

Adams involved an appeal from a conviction for violation of an

9. Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 548 (1968) (footnotes omitted).

10. B. CARDOZO, *THE GROWTH OF THE LAW* 3 (1924).

11. The potential for disagreement as to whether a prior decision is controlling was most evident in the opinions in *Eaton v. Price*, 360 U.S. 246 (1959) and *Ohio v. Price*, 364 U.S. 263 (1960). For the denouement, see *Camara v. Municipal Court*, 387 U.S. 523 (1967). *But see* *Wyman v. James*, 400 U.S. 309 (1971).

12. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

13. *See, e.g., Rosenbloom v. Virginia*, 388 U.S. 450 (1967), citing as dispositive *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958). *Summerfield* is frequently cited. *See, e.g., California v. LaRue*, 409 U.S. 109, 116 (1972). *Summerfield* was a memorandum opinion that reversed the lower court, merely citing *Roth v. United States*, 354 U.S. 476 (1957).

14. 354 U.S. 931 (1957), *rehearing denied*, 355 U.S. 851 (1957). The Court cited as dispositive *Alberts v. California*, 352 U.S. 962 (1957), *Kingsley Books, Inc. v. Brown*, 352 U.S. 962 (1957), and *Roth v. United States*, 352 U.S. 964 (1957). The Court cites to its grants of certiorari and notation of probable jurisdiction and not to the actual disposition of the cases. For those, see *Roth v. United States*, 354 U.S. 476 (1957); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). Justice Warren would have set *Adams* for argument. Justices Black and Douglas dissented, and Justice Brennan did not participate in the decision.

ordinance of Newark, New Jersey, which, *inter alia*, prohibited lewd dancing.¹⁵ The Supreme Court of New Jersey affirmed the conviction, even though it found that theatrical performances, including the burlesque show involved, fell within the protective ambit of the first amendment.¹⁶

When the Supreme Court subsequently dealt with other cases involving ordinances proscribing topless dancing (*California v. LaRue*¹⁷ and *Doran v. Salem Inn, Inc.*¹⁸), it never mentioned *Adams*, although a California decision cited in *LaRue* had cited in its opinion the New Jersey Supreme Court *Adams* opinion.¹⁹

The lack of attention given to the Court's memorandum opinions becomes clearer when one discovers that the California court that had cited the New Jersey Supreme Court opinion failed to note by citation or otherwise that *Adams* was affirmed by the United States Supreme Court.²⁰

The slighting of *Adams* does not illustrate an isolated instance. In at least nine other state and federal opinions, the New Jersey Supreme Court decision is cited with no reference to the Court's affirmance.²¹

15. The relevant portions of the ordinance, NEWARK, N.J., REV. ORDINANCES ch. 8, art. XIV, §8 (1955), are set forth in *Adams Newark Theater Co. v. City of Newark*, 22 N.J. 472, 475, 126 A.2d 340, 341-42 (1956), *aff'd* 354 U.S. 931 (1957).

16. 22 N.J. at 475, 126 A.2d at 342.

17. 409 U.S. 109 (1972).

18. 422 U.S. 922 (1975).

19. The case cited by the Court in *LaRue* is *In re Giannini*, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), *cert. denied*, 395 U.S. 910 (1969). *See LaRue*, 409 U.S. at 130.

20. *See In re Giannini*, 69 Cal. 2d 563, 567 n.1, 446 P.2d 535, 539 n.1, 72 Cal. Rptr. 655, 659 n.1, (1968), *cert. denied*, 395 U.S. 910 (1969).

21. *Kirzenbaum v. Paulus*, 51 N.J. Super. 186, 196, 144 A.2d 25, 31 (1958), *aff'd*, 57 N.J. Super. 80, 153 A.2d 847 (1959); *State v. Congdon*, 76 N.J. Super. 493, 503, 185 A.2d 21, 30 (1962); *Silco Automatic Vending Co. v. Puma*, 105 N.J. Super. 72, 93, 251 A.2d 147, 158 (1969), *rev'd*, 108 N.J. Super. 427, 261 A.2d 174 (1970); *State v. Shapiro*, 122 N.J. Super. 409, 420, 300 A.2d 595, 601 (1973); *Gardens v. City of Passaic*, 130 N.J. Super. 369, 327 A.2d 250, 256 (1974), *aff'd sub nom* *Iafelice v. City of Passaic*, 141 N.J. Super. 436, 358 A.2d 805 (1976); *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69, 70 n.4 (N.D. Ill. 1959); *Hudson v. United States*, 234 A.2d 903, 905 n.4 (D.C. 1967); *Maryland State Bd. of Motion Picture Censors v. Times Film Corp.*, 212 Md. 454, 129 A.2d 833, 835 (1957); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483, 486 (1972).

Accordingly, the summary disposition in *Adams*, in its most favorable light, could be described as a judicial derelict on the legal seas.²²

Even if other courts took cognizance of the *Adams* memorandum affirmance, would reference to a prior Court decision provide more than a judicial Rorschach? Every jurist knows how difficult it is to ascertain the holding of a case.²³

Julius Stone suggests that use of prior precedents is a complex process in which judges,

by linking instant cases with precedents, and elaborating, by resort to rhetorical arguments, [generate] fresh solutions in single cases. In these parts the legal system is 'open,' in the sense that it does not offer mechanical keys to determinate solutions. This . . . does not mean that choice is at large, or that decisions may not command some degree of conviction springing from their anchorage in the *topoi*, the truths taken as common grounds for the time being.²⁴

Thus, it is not surprising to find that even when courts attempt to

22. The metaphor was suggested by Justice Frankfurter's comment concerning the status of *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211 (1916), given the Court's decision in *Dice v. Akron, Canton & Youngstown Ry. Co.*, 342 U.S. 359 (1952). Justice Frankfurter wrote: "the *Bombolis* case should be overruled explicitly instead of left as a derelict bound to occasion collisions on the waters of the law." 342 U.S. at 368-69 (Frankfurter, J., concurring in *Dice*).

23. Sometimes there is *no* such principle. See, e.g., *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). Or, with blocs on the Court, the holding requires addition of various principles to which a majority would accede. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). What constitutes a "fact" is itself an extremely complex question. See W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* 299-301 (1972); H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 369-85 (10th ed. 1958).

24. J. Stone, *Reasons and Reasoning in Judicial and Juristic Argument*, 18 *RUTGERS L. REV.* 757, 775 (1964). It also is interesting that T. Kuhn has analogized conceptual innovations in science to the judicial process: "In a science . . . a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* 23 (1962). This parallel is discussed at length in Lewis, *Systems Theory and Judicial Behavioralism*, 21 *CASE W. RES. L. REV.* 361, 415-42 (1970).

apply prior precedents cited by the Court in summary decisions, little guidance is available.²⁵ One particular circumstance demonstrates vividly how the Court's memorandum practice fails to communicate effectively the ratio decidendi of a case.

When the Court reverses and remands a case, merely citing an earlier decision as controlling, a lower court may, instead of following the Supreme Court's actual message, simply distinguish the case. This misreading forces the Court to again reverse summarily.²⁶ The lack of communication in this situation is evident. *McLeod v. Ohio*²⁷ illustrates well this Sisyphean process.

In *McLeod*, the record showed the appellant/accused had made incriminating statements while voluntarily helping the police to secure relevant evidence. Although then indicted, he had not been arraigned and had not requested nor retained counsel. Nor were the incriminating statements the product of trickery.

25. A clear illustration is provided by the memorandum opinion in *United States v. Ohio*, 385 U.S. 9 (1966). In that case, the doctrine of *Wickard v. Filburn*, 317 U.S. 111 (1942), was apparently extended to situations with no substantial impact on interstate commerce. Although the lower court did an excellent job of distinguishing *Wickard* (see 354 F.2d at 555-56), the Court, in reversing, merely cited *Wickard*. *United States v. Ohio* is probably overruled *sub silentio* by *National League of Cities v. Usery*, 426 U.S. 833 (1976). But who really knows? And how many have even considered the question, given the obscure status of such summary affirmances? The issue explicitly left unanswered in *Usery*—whether state sovereignty acts as a limitation on federal spending power (see *National League of Cities v. Usery*, 426 U.S. 833, 854 n.17 (1976))—was resolved by the Court in *North Carolina ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), in what Professor Tribe describes as an “unceremonious summary affirmance.” L. TRIBE, 1979 SUPPLEMENT TO AMERICAN CONSTITUTIONAL LAW 18 (1979). The Court dealt indecisively with the same issue relative to the federal taxing power in *Massachusetts v. United States*, 435 U.S. 444 (1978).

26. See, e.g., *Doughty v. Maxwell*, 372 U.S. 781, 781 (1963), “remanded for further consideration in light of *Gideon v. Wainwright*, 372 U.S. 335 (1962).” On remand, the state court distinguished *Gideon* and adhered to its original judgment. *Doughty v. Sacks*, 175 Ohio St. 46, 191 N.E.2d 727 (1963). The Court then reversed in *Doughty v. Maxwell*, 376 U.S. 202 (1964), citing *Carnley v. Cochran*, 369 U.S. 506 (1962) and *Gideon*. See also *O'Connor v. Ohio*, 382 U.S. 286 (1965) (reversed and remanded). On remand, the conviction was affirmed. *State v. O'Connor*, 6 Ohio St. 2d 169, 217 N.E.2d 685 (1966). On appeal, the Supreme Court again reversed. *O'Connor v. Ohio*, 385 U.S. 92 (1966). See also *Sims v. Georgia*, 385 U.S. 538 (1967), *on remand*, 223 Ga. 465, 156 S.E.2d 65 (1967), *rev'd by the Court in* 389 U.S. 404 (1967).

27. 381 U.S. 356 (1965).

These factors distinguish McLeod's situation sharply from that involved in *Massiah v. United States*.²⁸ In that case, the incriminating admissions of the accused were elicited by trickery and subsequent to both indictment *and* arraignment for the federal crime involved and after counsel had been retained. Indeed, the Court in *Massiah* appeared to limit its decision to its facts by stating that "[a]ll that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his [federal] trial."²⁹

The curious concatenation of affirmances and reversals occurred as follows: The Ohio Supreme Court affirmed McLeod's conviction,³⁰ and the Court reversed and remanded to the Ohio court "for consideration in light of *Massiah v. United States*. . . ."³¹ The Ohio Supreme Court affirmed McLeod's conviction again, finding that "the 'circumstances' under which his incriminating statements were given were wholly different from those in *Massiah*."³² Finally, the United States Supreme Court reversed with the unilluminating statement: "The judgment is reversed. *Massiah v. United States*. . . ."³³ This is perhaps another demonstration of the extraordinary facility with which a legal mind can think of something else without thinking of that to which it is connected.³⁴

If memorandum opinions such as *McLeod* constitute judicial Ror-

28. 377 U.S. 201 (1964).

29. *Id.* at 207 (emphasis deleted).

30. 173 Ohio St. 520, 184 N.E.2d 101 (1962). Actually, the conviction was affirmed when the appeal was dismissed "for the reason that no debatable constitutional question is involved." *Id.* at 520, 184 N.E.2d at 101. Apparently, the Ohio Supreme Court has learned something from the United States Supreme Court.

31. 378 U.S. 582 (1964) (citations omitted).

32. 1 Ohio St. 60, 62-63, 203 N.E.2d 349, 351 (1964).

33. 381 U.S. 356 (1965) (citation omitted).

34. See Auerbach, *A Plague of Lawyers*, HARPER'S MAGAZINE 37, 42 (Oct. 1976). See also Von Jhering, *Im Juristischen Begriffshimmel*, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678, 681 (M. Cohen & F. Cohen eds. 1951), in which Von Jhering made the judicial application when he posited a test for admission to the heaven of juristic concepts that required the applicant to display "ability to construe a legal institution without regard to its real practical significance, but purely on the basis of the concept itself or its original sources."

schachs, then memorandum opinions dismissing appeals for lack of a substantial federal question are the pages *sans* blot because these opinions set forth *no* precedent. However, the difference is not merely one of degree, but of kind. At least in summary affirmances and reversals, the Court finds that there is sufficient disagreement about the merits of the federal question presented to require citation to an applicable case. But this is not so where the question is deemed insubstantial.

If a plaintiff attempts to invoke federal jurisdiction in a district court but his claim is deemed insubstantial, no case or controversy exists and the case is necessarily dismissed—obviously a decision not on the merits and without precedential effect. As the high Court has instructed lower courts:

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are “so attenuated and unsubstantial as to be absolutely devoid of merit” . . . ; “wholly insubstantial” . . . ; “obviously frivolous” . . . ; “plainly unsubstantial” . . . ; or “no longer open to discussion”. . . One of the principal decisions on the subject, *Ex parte Poresky* . . . held, first, that “[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question be presented. . . .”³⁵

We can readily perceive how the Court could conclude that frivolous claims fail to present the type of federal questions required to satisfy the case or controversy article III jurisdictional requisite.³⁶

35. *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted).

36. *United States ex rel Mayo v. Satan*, 54 F.R.D. 282 (W.D. Pa. 1971), provides an amusing illustration of a frivolous action. There the plaintiff instituted a civil rights action against Satan for causing the plaintiff misery and placing deliberate obstacles in his path which led to his downfall. The court dismissed for lack of jurisdiction over the person of Satan. The Supreme Court has frequently indicated that frivolous claims will not support federal jurisdiction. Early cases to that effect include: *Wynn v. Morris*, 61 U.S. (20 How.) 3 (1857); *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258, 261 (1867); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891); *Hamblin v. Western Land Co.*, 147 U.S. 531, 532 (1893); *Wilson v. North Carolina*, 169 U.S. 586, 595 (1898); *Equitable Life Assurance Soc’y v. Brown*, 187 U.S. 308, 311 (1902). In *Millingar v. Hartupee*, the language the Court used was particularly revealing. It dismissed a suit for lack of jurisdiction because “[s]omething more than a bare assertion of [the federal question] . . . seems essential to the jurisdiction of this Court.” *Id.* at 261. See discussion in Ulman & Spears, *Dismissed for Want*

The issue is more complex where the federal question supporting jurisdiction is arguably insubstantial because it is not open to discussion, i.e., its resolution is a Hobson's choice.³⁷ The Heraclitean assumption that the only constancy is change appears to hold with considerable vigor in judicial decision making. Is any resolution by the Court totally foreclosed from review? The Court has frequently observed that *stare decisis* has less force where constitutional interpretation is required; after all the Court "must never forget, that it is *a constitution* . . . [it is] expounding."³⁸

A striking example was provided when the Court, after deciding and publishing its opinion involving court martial jurisdiction over civilians, reversed itself and published a new opinion on rehearing the following term.³⁹

of a Substantial Federal Question, 20 B.L. REV. 501 (1940). The authors note that "[l]ater cases point to this remark as the first statement of the doctrine that a substantial federal question is a prerequisite of Supreme Court jurisdiction in appeals from state courts." *Id.* at 507. There are cases in which the Court did summarily affirm, but the applicable prior precedents are discussed. *See, e.g.,* Penna Co. v. Donat, 239 U.S. 50, 51-52 (1915).

37. The early cases dealing with insubstantiality by virtue of the certainty of the relevant rule are cited under the "Rule of Precedents" in 2 ENCYCLOPEDIA OF UNITED STATES SUPREME COURT REPORTS 309 n.42 (1908).

38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Brandeis also commented incisively on the role of *stare decisis* in constitutional interpretation:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J. dissenting) (citation omitted).

39. *See Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956), *on rehearing*, 354 U.S. 1 (1957). Of course, a change in the Court's personnel had occurred, not an unanticipated recurring event. Individual justices do, of course, reverse themselves. Consider, for example, Justice Black's change of position in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), from his earlier stance in

Accepting the Court's conclusion that there are federal questions so settled as properly characterized, along with frivolous claims, as too insubstantial to support jurisdiction in a district court, then it follows that the same doctrine should apply to cases where appellate jurisdiction is invoked on the basis of a federal question properly raised. At least since *Marbury v. Madison*,⁴⁰ the Court has considered itself as constrained as other federal article III courts by the article III case or controversy strictures. Thus, if the party attempting to invoke the appellate jurisdiction of an article III court presents as the basis for jurisdiction only an insubstantial federal question, the appeal should be dismissed for lack of jurisdiction—a decision clearly not reaching the merits. Until *Hicks v. Miranda*,⁴¹ however, the precedential effect of a Supreme Court's dismissal of an appeal for lack of a substantial federal question was uncertain. In fact, such dismissals were often ignored.

For example, in *Rosenblatt v. American Cyanamid Co.*,⁴² the Court dismissed an appeal for insubstantiality, thereby apparently upholding the validity of the New York "long-arm" statute.⁴³ Yet when the case is cited in Hart and Wechsler's *The Federal Courts and the Federal System*, one of the most comprehensive casebooks ever published, the reference is to Justice Goldberg's denial of a stay, with no reference to the Court's opinion dismissing the appeal.⁴⁴ Clearly the

Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

40. 5 U.S. (1 Cranch) 137 (1803).

41. 422 U.S. 332 (1975).

42. 382 U.S. 110 (1965), *rehearing denied*, 382 U.S. 1002 (1965).

43. N.Y. CIV. PRAC. § 302(a)(2) (McKinney 1963) provided, *inter alia*, that
A Court may exercise jurisdiction over any non-domiciliary . . . as to a cause of
action arising from any of the acts enumerated in this section, in the same man-
ner as if he were a domiciliary of the state, if, in person or through an agent, he:

. . . .

(2) commits a tortious act within the state. . . .

The Supreme Court had not previously dealt specifically with this question, although some state courts had spoken. *See, e.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); F. JAMES, JR., *CIVIL PROCEDURE* 644-53 (1965). The relevant decisions of the Court are discussed in Mr. Justice Goldberg's order denying a stay in the case. *See Rosenblatt v. American Cyanamid Co.*, 382 U.S. 1002 (1965).

44. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 627, 631, 1554 (2d ed. 1973). The same omission occurs in J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL*

authors did not believe such a dismissal was of precedential weight. Former Justices Goldberg and Clark have indicated that they never viewed these dismissals as dispositions on the merits.⁴⁵

The Court ostensibly provided an answer to the question of the precedential value of dismissals for insubstantiality on appeal in *Hicks v. Miranda*.⁴⁶ In *Hicks*, the Court stated that cases dismissed for lack of a substantial federal question constitute dispositions on the merits.⁴⁷ It also noted in a disingenuous understatement that "[a]scertaining the reach and content of summary actions may itself present issues of real substance."⁴⁸ The Court had further opportunity to clarify the impact of a dismissal in *Mandel v. Bradley*.⁴⁹ In *Mandel*, the Court wrote:

PROCEDURE: CASES AND MATERIALS 122-23 (1968). The second edition of F. JAMES, JR. & G. HAZARD, CIVIL PROCEDURE 630-34 (2d ed. 1977), makes no reference to *Rosenblatt* even though the validity of "long arm" statutes is discussed.

45. Mr. Justice Goldberg mentioned this to the author during a conversation. Mr. Justice Clark's view is set forth in his concurring opinion in *Hogge v. Johnson*, 526 F.2d 833, 836 (4th Cir. 1975): "During [the eighteen terms in which I sat] . . . [such dismissals] received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight." Some political scientists even after *Hicks* still believe such a dismissal is to be given the same weight as a denial of certiorari. See R. FUNSTON, A VITAL NATIONAL SEMINAR 26 (1978).

46. 422 U.S. 332 (1975).

47. The evolution of such an unequivocal rule exemplifies a bootstrapping technique frequently used in legal reasoning. Professor C. Wright supported such a rule in 1963 by citing, *inter alia*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 164 (3d ed. 1962), with a "cf." citation to R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 104 (R. Wolfson & P. Kurland eds. 1951). C. WRIGHT, LAW OF FEDERAL COURTS 431 (1963). To the same effect, see his 1970 second edition at 495. Robertson & Kirkham note that "the memorandum dismissals by the Supreme Court for want of a substantial federal question often constitute undisclosed determinations on the merits." ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES at 104. In *Hicks v. Miranda*, the Court cites, *inter alia*, C. WRIGHT, LAW OF FEDERAL COURTS 495 (2d ed. 1970). Professor Wright in his latest edition now relies solely on *Hicks*. C. WRIGHT, LAW OF FEDERAL COURTS 551 n.25 (3d ed. 1976). Justice White, author of the Court's opinion in *Hicks v. Miranda*, appears uncertain concerning the doctrine he elaborated. In his dissent from the dismissal for lack of a substantial federal question in *Thomas v. New York*, ___ U.S. ___, 100 S. Ct. 197 (1979), he expresses concern about leaving lower courts in conflict. If the dismissal is on the merits, as he suggested in *Hicks*, the conflict is resolved.

48. 422 U.S. at 344.

49. 432 U.S. 173 (1977).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.⁵⁰

Despite the ostensibly clear principle enunciated in *Mandel*, the significance of such dismissals remains an enigma. For example, in *Jones v. Louisiana*,⁵¹ the Court's rationale for the dismissal is a tenebrious Zuckerkandlite.⁵² *Jones* followed *Duncan v. Louisiana*,⁵³ which held the sixth amendment's guarantee of jury trial applicable to a state trial where the offense carried a maximum two-year sentence. But *Jones* came before *De Stefano v. Woods*,⁵⁴ which determined that the *Duncan* doctrine was hybrid prospective. From the Court's decision to hear *De Stefano*, it would seem the Court in *Jones* was applying a principle relevant to the type of offense to which the sixth amendment right to jury trial attaches and not a prospectivity issue. But because *Jones* involved offenses, one of which resulted in a one-year sentence, and the Court shortly thereafter applied the jury trial provision to offenses carrying sentences of more than six months in *Baldwin v. New York*,⁵⁵ certainly the federal question concerning that issue was substantial at the time of *Jones*.

Curiously enough, the Court in *Baldwin* not only fails to mention *Jones*, but also states: "In this case, we decide only that a potential

50. *Id.* at 176. The Court continues to place emphasis on the jurisdictional statement. See *McKeesport Area School Dist. v. Pennsylvania Dep't of Educ.*, ___ U.S. ___, 100 S. Ct. 2953 (1980). Because the jurisdictional statement is prepared by counsel seeking review, the statement could tend to overstate the issues presented.

51. 392 U.S. 302 (1968).

52. Dr. Zuckerkandl, a creation of Robert Hutchins, had as his chief goal reducing communication to a minimum. A typical Zuckerkandlite was provided by President Eisenhower's response to a question about integration in Southern schools: "However, when the Federal Court gets into the thing, you have got a judicial thing, or I mean a legal thing, that I have gone as far as I know the answer." Hutchins, *Living Without Guilt*, 18 *CENTER DIARY* 37, 38 (May/June 1967).

53. 391 U.S. 145 (1968).

54. 392 U.S. 631 (1968).

55. 399 U.S. 66 (1970).

sentence in excess of six month's imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.' *None of our decisions involving this issue have ever held such an offense 'petty.'*"⁵⁶ The Supreme Court of Louisiana also did not find precedent from the high Court to aid it in arriving at a decision.⁵⁷

Trying to apply the *Mandel* test to the *Duncan*, *Jones*, and *Baldwin* trilogy highlights the cacophony of the Court's statement. The jurisdictional statement in *Jones* sets forth the following question presented: "Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a one year prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?"⁵⁸ If the Court, in its dismissal of *Jones*, held no right to a jury trial exists where a sentence of one year is imposed, how, then, did *Baldwin*, a case involving the imposition of six month's imprisonment, warrant an extensive opinion? Was the *Baldwin* issue not already decided by the dismissal of *Jones*?

The question naturally arises whether the Court *really* meant that dismissals for want of a substantial federal question necessarily "without doubt reject the specific challenges presented in the statement of jurisdiction."⁵⁹ Can the Supreme Court possibly mean what it says when it dismisses a case presenting truly fundamental issues? *Potts v. Kentucky*⁶⁰ illustrates the difficulty of taking the Court's words literally.

Potts was dismissed for want of a substantial federal question. The Court cites the reader to the lower court's decision in *Potts v. Kentucky* for the facts and opinion. At the designated page appears a table indicating that the Kentucky opinion in *Potts* is unreported.⁶¹ The jurisdic-

56. 399 U.S. at 69 n.6 (emphasis supplied).

57. *State v. Jones*, 251 La. 431, 204 So. 2d 775, 778-79 (1967), *appeal dismissed*, 392 U.S. 302 (1968).

58. Appellant's Jurisdictional Statement at 2, *Jones v. Louisiana*, 392 U.S. 302 (1968).

59. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

60. 435 U.S. 919 (1978).

61. The relevant portion of the unreported decision of the Court of Appeals of Kentucky reads: "The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this court." *Potts v. Commonwealth of Kentucky*, No. 76-257 (Ky. Ct. App. July 8, 1977). It is not unusual to find significant Court opinions involving unpublished lower court opinions. *See, e.g.*,

tional statement, however, frames the issue before the Court.⁶²

Sullivan v. Little Hunting Park, Inc., 392 U.S. 657, 657 (1968), vacating an unpublished opinion of the Virginia Supreme Court of Appeal and remanding “for further consideration in light of *Jones v. Alfred H. Mayer Co.* . . .,” which is located at 392 U.S. 409 (1968). Predictably the Virginia court found *Jones* distinguishable, *Sullivan v. Little Hunting Park, Inc.*, 209 Va. 279, 163 S.E.2d 588 (1968), and the United States Supreme Court again reversed. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The increase in unpublished opinions is not nearly as disturbing as the emergence of no citation rules. See Ky. R. Civ. P. 76.28(4)(c) (1977). The United States Court of Appeals for the Sixth Circuit Local Rule 11 provides:

“Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published unless this rule is quoted at a prominent place on the first page of the decision so published.”

Justice Stevens comments on this development:

A rule limiting the number of opinions to be published in the official reports is justifiable and desirable as long as the opinions are available to the Bar and to the public. For I am well aware of the fact that appellate judges—including myself—write more than is necessary. But censorship in the form of a no-citation rule is fundamentally different from a decision not to publish certain opinions generally.

Address by Justice Stevens to the Illinois State Bar Association’s Centennial Dinner: Some Thoughts and Reflections on the Litigation Explosion and How It Has Affected the Courts’ Ability to Cope with the Problem, *reprinted in* ILL. B.J. 508, 510 (1977). The no-citation rules have raised interesting challenges. In *Carter v. United States*, 590 F.2d 138 (6th Cir. 1979), *cert. denied*, 431 U.S. 965 (1977), *rehearing denied*, 434 U.S. 882 (1977), the petition for rehearing raised the question:

Whether the existence and application to Petitioner’s case of the United States Court of Appeals for the Sixth Circuit’s Local Rule 11 (rendering the Appellate Court’s decision in Petitioner’s case of no precedential value whatsoever) denied Petitioner his right to an appeal in accordance with the Federal Statutes and the Constitution of the United States since: (1) Local Rule 11 is substantive and therefore not authorized by the Federal Rules of Appellate Procedure or 28 U.S.C., Section 2071; (2) Local Rule 11 operates to produce non-justiciable decisions inconsistent with the case or controversy requirement of Art. III of the Constitution of the United States; (3) Local Rule 11 on its face and as applied in Petitioner’s case, constitutes invidious discrimination in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution; and (4) Local Rule 11 unconstitutionally infringes the rights of expression and press guaranteed by the First Amendment of the Constitution of the United States.

Petitioner’s Brief for Rehearing at 2-3, *Carter v. United States*, 434 U.S. 882 (1977).

62. The jurisdictional statement indicates that the specific challenge raised was: Do Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application

The facts presented in the jurisdictional statement reflect a shocking lack of effective assistance of counsel at trial. The defense attorney committed innumerable blunders at the defendant's trial for rape. Among other errors, the trial lawyer failed to interview witnesses, failed to introduce discovery motions, failed to introduce jury instructions and failed to use damaging statements made by the alleged rape victim to impeach her credibility.⁶³

The court of appeal refused to listen to appellant's arguments because the issue of ineffective legal assistance was not raised in the trial court. Discretionary review sought on the basis of a due process violation was denied by the Kentucky Supreme Court. A strict application of the rule established in *Mandel* leads to the conclusion that the challenges made in *Potts*, i.e., violations of procedural fairness, were rejected by the high Court.⁶⁴ Does this dismissal, as *Mandel* explicitly states, prevent lower courts from arriving at a different result when the next similar factual situation arises? If the answer is yes, then the Court displays a callous disregard for the fair trial rights of a defendant.

If jurisdictional statements are the guide to determining the meaning of these dismissals, the general inaccessibility of these jurisdictional statements is of considerable concern. *Mutatis mutandis*, we can apply Justice Jackson's sage advice concerning the interpretation of the Miller-Tydings Act in *Schwegmann Bros. v. Calvert Distillers Corp.*⁶⁵

by the Kentucky Court of Appeals and the Supreme Court of Kentucky, as stated in the case of *Caslin v. Commonwealth of Kentucky*, 491 S.W.2d 832 (1973), wherein the courts held that any appellant may not raise the question of ineffective assistance of counsel unless the counsel who is being alleged ineffective raises the question of his own ineffectiveness, or else the question will be forever barred, violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore vitiate the conviction of the appellant.

Appellant's Jurisdictional Statement at 4, *Potts v. Kentucky*, 435 U.S. 919 (1978). The status of the *Potts* dismissal is apparently understood by the Kentucky Supreme Court (see *Hamilton v. Commonwealth*, 580 S.W.2d 208, 211 (Ky. 1979)), but not by some commentators. See *Collier, Criminal Procedure*, 68 Ky. L.J. 655, 678 n.120 (1980).

63. Appellant's Jurisdictional Statement at 5-6, *Potts v. Kentucky*, 435 U.S. 919 (1978).

64. See note 61 *supra*.

65. 341 U.S. 384 (1951).

There are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.⁶⁶

Frequently the Court and lower courts appear oblivious to the insubstantial question dismissals. Fairly representative is the striking omission in the Supreme Court of Ohio's opinion in *Primes v. Tyler*,⁶⁷ which held that the Ohio guest statute violated the fourteenth amendment's equal protection clause. The opinion rested on both state and federal provisions. Certainly as to the federal provision, the overriding authoritative law comes from the Court.

Prior to writing the opinion in *Primes*, the justices of the Supreme Court of Ohio should have been aware of *Cannon v. Oviatt*,⁶⁸ a case dismissed by the Court for lack of a substantial federal question. The jurisdictional statement in *Oviatt* indicated that the question presented was:

Whether the Utah guest statute, section 41-9-1, Utah Code Annotated (1953) is unconstitutional in that it violates the equal protection guarantee of the Fourteenth Amendment of the United States Constitution in creating classifications among those permitted and those denied recovery for negligently inflicted injuries that bear no fair, substantial or rational relation to the purposes of the legislation.⁶⁹

The Ohio court did cite the Utah Supreme Court's opinion in *Can-*

66. 341 U.S. at 395, 396-97 (1951) (Jackson, J., concurring).

67. 43 Ohio St. 195, 331 N.E.2d 723 (1975).

68. 419 U.S. 810 (1974).

69. Appellant's Jurisdictional Statement at 3, *Cannon v. Oviatt*, 419 U.S. 810 (1974). Shortly after this, jurisdictional statements began to appear in microform, making them more accessible. More libraries now have the relevant material. Compare R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 10-15 (3d ed. 1962) with R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 1158-72 (5th ed. 1978).

non v. Oviatt,⁷⁰ but completely ignored the affirmance through dismissal by the Court, even though a later Court decision is cited.⁷¹

The Court itself generally acts as though the dismissals are nonexistent, but often enough relies on them to require lawyers and courts to become knowledgeable about their potential import.⁷² Justice White's opinion, in *Patterson v. New York*,⁷³ provides a striking example of the significance of a dismissal. In *Patterson*, New York law required a defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the charge to manslaughter. The constitutional question presented was whether the New York rule was consistent with the doctrine enunciated in *Mullaney v. Wilbur*,⁷⁴ which established that the state must prove all elements of a criminal offense beyond a reasonable doubt. Justice White, in rejecting the defendant's *Mullaney* argument, reasoned:

Subsequently [after *Mullaney*], the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Rivera v. Delaware*, an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The

70. 43 Ohio St. at 203, 331 N.E.2d at 728 (1975).

71. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

72. In *Hicks* the Court was quite emphatic: "The three-judge court was not free to disregard [an earlier dismissal for insubstantiality]." 422 U.S. at 344. The Court has vacillated considerably on how much deference is due. It appears the Court views itself not as constrained as it would be by a plenary opinion: "our decision not to review fully the questions presented in *Orsini v. Blasi* [423 U.S. 1042 (1976), dismissing for lack of substantiality] is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. . . . Insofar as our decision is inconsistent with our dismissal in *Orsini*, we overrule our prior decision." *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). To the same effect, see *Elections Bd. v. Socialist Workers Party*, 400 U.S. 173, 180-81 (1979). For an earlier case dealing with the precedential weight accorded summary affirmances, see *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

73. 432 U.S. 197 (1977).

74. 421 U.S. 684 (1975).

claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney*. We dismissed the appeal as not presenting a substantial federal question. *Cf. Hicks v. Miranda*. . . .⁷⁵

With considerable prescience, Justice Brennan earlier observed, in dissenting from the dismissal in *Rivera v. Delaware*,⁷⁶ that

The Court's summary disposition of this case is especially inappropriate since *Hicks v. Miranda* accords that disposition precedential weight. See also *Colorado Springs Amusements v. Rizzo*. Given the transparent erosion of *Leland* by *Winship* and *Mullaney*, the question whether *Leland* has continuing validity surely merits full briefing and oral argument.⁷⁷

It is not unusual for the Court to base all or part of its decisions in cases given plenary consideration on prior memorandum dismissals for the lack of substantiality.⁷⁸ Once counsel and lower courts become more knowledgeable about the Court's use of these dismissals, we can anticipate more frequent incorporation of these precedents into briefs and lower court opinions.

Conclusion

The Court's extensive use of dismissals for lack of a substantial federal question (in the post-*Hicks v. Miranda* era)⁷⁹ constitutes a seri-

75. 432 U.S. at 205 (citations omitted).

76. 429 U.S. 877 (1976).

77. 429 U.S. at 880 (citations omitted).

78. See, e.g., *McCarthy v. Philadelphia Civil Serv. Comm.*, 424 U.S. 645, 646 (1976); *Leis v. Flynt*, 439 U.S. 438, 443 (1979); *Walz v. Tax Comm.*, 397 U.S. 664, 686 n.6 (1970) (Brennan, J., concurring).

79. During the 1974-1978 terms, the Court dismissed 357 appeals for lack of substantial federal question, an average of approximately 71 cases per term. There were 85 dismissals during the 1979 term.

<u>Term</u>	<u>Dismissal for Lack of Substantial Federal Question</u>
1974	66
1975	77
1976	60
1977	81
1978	73
1979	85

ous intrusion into the Rule of Law. A brief survey of this practice reveals that the Court uses this technique in a significant number of cases to generate "law" that is generally unknown—if not unknowable—but that is binding precedent for all except Supreme Court Justices who can selectively overrule, ignore, or cite these dismissals at their discretion. Indeed, just the description of the practice sounds like the antithesis of a Rule of Law. The cost, then, must be counted as high for the Court as an institution that depends so much for its power and effectiveness on continued perception by the legal profession and the public that its decision making involves a process of reasoned elaboration in which cases are resolved according to neutral principles.

To revert to the earlier pre-*Hicks* position that such dismissals, like denials of certiorari, are not of precedential weight would cost the Court nothing in terms of consistency or guidance to the litigants and public.

This position would also appear to be more consistent with its jurisprudence concerning article III jurisdiction. Why the Court continues like Caligula to adhere to this pernicious practice defies explanation. Case dismissed FOR LACK OF A SUBSTANTIAL QUESTION.

The Marriage Penalty: Restructuring Federal Law to Remedy Tax Burdens on Married Couples

Gail Levin Richmond*

In 1975 Professor Boris Bittker wrote a comprehensive article entitled *Federal Income Taxation and the Family*.¹ Later that year, David and Angela Boyter obtained the first in a series of three divorces.² The Boyters undertook year-end-divorce/year-beginning-marriage ceremonies in 1975-76 and in 1976-77,³ not because of marital discord but rather to "upgrade" their income tax filing status from married to single.

The Boyters illustrate a problem addressed by Professor Bittker in the second part of his article.⁴ They, like many other dual income married couples, pay a higher income tax on their combined salaries because they are married than they would pay if they were single. What set the Boyters apart from the majority of this group is the self-help remedy they employed to reduce this tax burden. While the efficacy of

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1. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975).

2. The Boyters' divorces have been the subject of various articles, both scholarly and those designed for popular reading. See, e.g., Note, *The Haitian Vacation: The Applicability of Sham Doctrine to Year-End Divorces*, 77 MICH. L. REV. 1332 (1979); Comment, *Congressional Sanction of Illicit Cohabitation—The Tax Reform Act of 1969*, 1979 B.Y.U. L. REV. 940 (1979); Richmond, *Divorce American Style (For Taxes)*, NOVA PERSPECTIVE, Spring 1980, at 4; *Griping Grows Louder Over "Marriage Tax,"* U.S. NEWS & WORLD REPORT, Jan. 29, 1979, at 71; Kaminski, *The Marriage Penalty & Other Taxing Aspects of Wedded Life*, Nat'l L.J., June 2, 1980, at 24, col. 1; Main, *Making Marriage Less Taxing*, MONEY, Jan. 1980, at 47; McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469 (1980).

3. Their 1977 divorce was not followed by remarriage. The couple continues to live together, however.

4. Bittker, *supra* note 1, at 1416-44.

that remedy has been placed in doubt by the Tax Court's recent decision upholding the government's challenge to the validity of the 1975 and 1976 divorces,⁵ the problems illustrated by the Boyters' actions must be faced by Congress shortly,⁶ whether or not a successful appeal is taken from the Tax Court decision.⁷ Several bills already await action by Congress,⁸ and some state governments have implemented alternatives to what has been called the "marriage penalty."⁹ This article

5. *Boyter v. Commissioner*, 74 T.C. ___, Nos. 11445-77 & 11446-77 (Aug. 6, 1980). Although the Internal Revenue Service attacked the 1975 and 1976 divorces as shams, it has not done so with respect to the 1977 divorce, in which the Boyters became permanently unmarried. Compare Rev. Rul. 76-255, 1976-2 C.B. 40, with IRS Private Letter Ruling 7835076 (1978). The Tax Court did not reach the government's contention that the Boyter divorces were shams for purposes of federal law, as it was able to decide the marital status question on state law grounds. Because the Boyters remained Maryland domiciliaries while obtaining divorces in Haiti and the Dominican Republic, Judge Wilbur determined that "Maryland would not recognize the foreign divorces as valid to terminate the marriage" 74 T.C. at ___. The opinion contains an extensive discussion of state recognition of foreign divorce decrees. This discussion was deemed necessary because there was no Maryland decision directly addressing this issue and the court was forced to choose the rule it felt the Maryland high court would have adopted. See *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

6. Both the Democratic and Republican platforms state their respective parties' opposition to the "marriage penalty." See, e.g., Democratic Party platform plank on "Women and the Economy," approved by the platform committee on June 24, 1980; Republican Party platform plank on "Strong Families," approved by the convention on July 15, 1980. Already introduced in Congress and awaiting action are over thirty bills dealing with the problem in one way or another. These bills are listed by type in Appendix I *infra* and are discussed later in this article at pp. 45-54 *infra*.

7. Because the Boyters reside in Maryland, the United States Court of Appeals for the Fourth Circuit would hear any appeal. In its recent decision in *Ensminger v. Commissioner*, 610 F.2d 189 (4th Cir. 1979), that court noted various cases in which the different tax rate schedules had survived challenges to their constitutionality. *Id.* at 192. Earlier in the opinion, the court remarked that certain inequalities in tax consequences may result from residence in one state as opposed to another, "but it illustrates the deference Congress has demonstrated for state laws in this area and its attempts to insure that, in the application of federal tax laws, taxpayers will be treated in their intimate and personal relationships as the state in which they reside treats them." *Id.* at 191. Only if the court of appeals disagrees with the Tax Court on the state law issue will the sham issue be raised again in *Boyter*.

8. See Appendix I *infra*.

9. Later in this article the tax systems of New York, North Carolina and Ohio will be discussed as illustrating issues raised by the various alternatives for federal

will discuss the suggested solutions and offer further proposals for legislative study.

A Brief Historical Perspective

One can best understand the conflicting viewpoints which resulted in *Boyer* if that case is viewed from a historical perspective. The major federal¹⁰ taxes that affect residents of the United States are the income tax and the various taxes imposed on gratuitous property transfers, gift, estate and generation skipping transfer taxes. To some extent, but by no means entirely, the amount of these taxes paid by any particular individual is dependent upon his or her marital status. Thus, the focal point of the material which follows is the use of marital status in legislation and judicial decisions affecting federal tax liability.

The first income tax statute,¹¹ assessing a flat three percent tax on incomes in excess of eight hundred dollars,¹² did not mention marital status; the tax was imposed on the income of "every person."¹³ Subsequent Civil War era income tax statutes did not vary in this regard,¹⁴ nor did the short-lived 1894 Act.¹⁵

action. See pp. 54-57 *infra*.

10. Because not all of the states levy income or transfer taxes, and because those which do have not opted for uniformity in approach, discussion in this section will be limited to federal taxes. But see Appendix II *infra* for a comparison of certain characteristics of state income tax laws.

11. Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 309. Although repealed less than a year later, Act of July 1, 1862, ch. 119, § 89, 12 Stat. 473, its treatment of individuals was repeated in subsequent legislation. See statutes cited in note 14 *infra*.

12. Because the first \$800 was exempt from this tax, a slight degree of progression did exist.

13. Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 309. So long as the tax was essentially proportional in nature, married couples who both had income paid the same amount of tax they would have paid had they been single and living together and the same amount on two separate returns as would have been due had a combined return been allowed or required.

14. Act of July 1, 1862, ch. 119, § 90, 12 Stat. 473; Act of Mar. 3, 1863, ch. 74, § 11, 12 Stat. 723; Act of June 30, 1864, ch. 173, § 116, 13 Stat. 281; Act of Mar. 3, 1865, ch. 78, § 1, 13 Stat. 479.

15. Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 553, declared unconstitutional as an unapportioned direct tax in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff'd on rehearing*, 158 U.S. 601 (1895).

In 1913 Congress enacted the first post-sixteenth amendment income tax statute.¹⁶ As the committee reports indicate, marital status was considered relevant to an individual's tax burden. While the first \$3,000 of a single individual's income was deductible in computing taxable income, married couples could exempt the first \$4,000.¹⁷ In explaining its decision to vary the exemption from the flat \$4,000 deduction proposed by the House of Representatives, the Senate Finance Committee stated: "[I]t is deemed equitable as recognizing the added obligations on account of marriage and children and salutary as emphasizing the family as the unit in our social structure."¹⁸

Because each individual filed a tax return based upon his or her own income, two single individuals living together could take advantage of \$6,000 in exemptions if each had income of at least \$3,000; if only one had any income, there would be only one \$3,000 exemption.¹⁹ A married couple living together²⁰ could exempt no more than \$4,000 regardless of how much income each earned. By the same token, that couple could exempt the full \$4,000 even if only one spouse earned income.²¹

In one respect the married and the single individual received identical treatment. Each was subjected to tax only on his or her own income. This was an important consideration for married couples, because the 1913 tax rates were graduated,²² and in almost every instance a higher tax would be due if two incomes were combined on the same return than if each spouse filed a return reporting only one income.²³

In fact, the 1913 income tax provisions differentiated more be-

16. Act of Oct. 3, 1913, ch. 16, § II, 38 Stat. 166.

17. *Id.* § II(C).

18. S. REP. NO. 80, 63d Cong., 1st Sess. 25 (1913).

19. The same result would obtain for two single individuals who were not living with any other person.

20. The House version provided that each spouse should be entitled to a \$3,000 exemption if the couple was living separate and apart from each other. S. REP. NO. 80, *supra* note 18, at 24.

21. Act of Oct. 3, 1913, ch. 16, § II(C), 38 Stat. 168.

22. Rates ranged from 1% on the first \$1,000 of taxable income to as high as 7% on taxable incomes in excess of \$500,000.

23. If one spouse had a net loss which could have offset the other spouse's income, combining the two incomes would result in lower tax liability.

tween married couples deriving a substantial portion of their income from property and those receiving their income from salary, and between married couples in community property states and those residing in common law jurisdictions, than they did between married and single taxpayers. In the first instance, where income was derived from property, full advantage could be taken of income splitting if the couple divided ownership of the property rather than having only one spouse hold title. Because there were no federal transfer taxes in effect in 1913, property ownership could be arranged to allow income splitting without the imposition of an inhibiting transfer tax. As single taxpayers also could make use of property transfers to affect their tax consequences, marital status conferred neither benefit nor detriment.

When Congress enacted an estate tax in 1916, it failed to include a tax on inter vivos transfers.²⁴ Thus, property transfers to equalize income remained an effective tax reduction tool in a time period when income tax rates underwent a significant increase in the degree of their progressivity.²⁵

Although the 1920s were generally a period of income tax reduction,²⁶ a gift tax was enacted in 1924 to limit what might otherwise be deemed the voluntary nature of the estate tax.²⁷ Two years later this tax was repealed, and property owners continued to be favored over salaried workers with respect to their opportunities for tax reduction.²⁸

The community property/common law jurisdiction distinction became important as soon as tax rates were graduated. The eight commu-

24. Revenue Act of 1916, ch. 463, § 200 *et seq.*, 39 Stat. 777.

25. The maximum combined rate was increased from 7% in 1913 to 15% in 1916 and to 67% in 1917. The rapid increases in tax rates can be explained by the unprecedented funding needs occasioned by World War I. Although the income tax itself was not increased until 1916, additional excise taxes were levied in 1914 to replace customs revenue lost during what was then the European War. *See* S. REP. NO. 813, 63d Cong., 2d Sess. 1 (1914). The 1916 increases were attributed in part to the need to fortify the country, while the 1917 increases were passed to "defray war expenses." H.R. REP. NO. 922, 64th Cong., 1st Sess. 1 (1916); H.R. REP. NO. 45, 65th Cong., 1st Sess. 1 (1917).

26. At the time the final bill of the decade was enacted, the maximum individual income tax rate was 25%. Revenue Act of 1928, ch. 852, §§ 11-12, 45 Stat. 795-97.

27. Revenue Act of 1924, ch. 234, § 319, 43 Stat. 313.

28. Revenue Act of 1926, ch. 27, § 1200(a), 44 Stat. 126.

nity property states²⁹ treated married couples as a form of partnership, with the result that each spouse owned one-half of all property acquired by the community, including income from both property and personal services. If such ownership carried with it the right of reporting one-half of the community's income on each spouse's return, residents of these states would pay lower taxes than residents of common law states, where income was the property of the spouse who earned it and who was, therefore, solely liable for the taxes. The different tax rules imposed upon residents of these two types of jurisdiction inspired substantial legislation and litigation in the period between 1913 and 1948.

The Revenue Act of 1921 brought about a reduction in the high tax rates in effect during World War I, resulting in a maximum combined normal and surtax rate of fifty-eight percent for 1922.³⁰ The 1921 legislation also carried with it a right for married couples that was in most respects of no value: if they so wished, a husband and wife could combine their incomes on one joint return.³¹ Because no separate rate structure for such returns existed, the use of this privilege generally meant a higher tax burden in addition to joint and several liability.³²

The House of Representatives attempted to add to that law section 208, which was designed to eliminate the disparity of treatment between married couples residing in common law states and those residing in the community property jurisdictions. Section 208 would have included all community income in the gross income of the spouse having the management and control of the community property.³³ The Senate deleted this provision from the 1921 Act.³⁴

Because section 208 reflected a position held by the Treasury Department for several years, its congressional defeat was not its final bow. Indeed, the government's claims were upheld in *United States v.*

29. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

30. Revenue Act of 1921, ch. 136, §§ 210, 211(a)(2), 42 Stat. 233-37.

31. *Id.* § 223, 42 Stat. 250.

32. A lower tax would be possible, of course, if one spouse had losses to offset against the other spouse's income.

33. H.R. REP. NO. 350, 67th Cong., 1st Sess. 11 (1921).

34. H.R. REP. NO. 486, 67th Cong., 1st Sess. 21 (1921).

Robbins,³⁵ involving the California community property law in effect before 1917.³⁶ Even though the wife was granted a vested interest in community property in the other seven community property states, the broad powers of management granted the husband gave rise to doubts about the continued efficacy of income splitting in those jurisdictions as well. These doubts were resolved in the 1930 decision of *Poe v. Seaborn*,³⁷ but the statute of limitations was extended for community property returns pending the outcome of that litigation.³⁸

*Seaborn*³⁹ and another 1930 case, *Lucas v. Earl*,⁴⁰ gave the Supreme Court the opportunity to examine two income splitting arrangements—one a creature of community property law, the other a result of private contract. The Court determined that these arrangements had a different effect insofar as their federal income tax consequences were concerned. As noted earlier, the Treasury Department had attacked division of income in community property states, yet the Supreme Court allowed such division in *Seaborn*, averring that “The law’s investiture of the husband with broad powers, by no means negatives the wife’s present interest as a co-owner.”⁴¹

The Court was not unmindful of the fact that this decision would result in differential treatment for common law and community property residents.⁴² Earlier that same year, it had invalidated a contractual arrangement for interspousal income splitting. Although the contract involved in *Earl* predated the post-sixteenth amendment income tax by twelve years, the Court felt that validating such an arrangement would allow “the fruits [to be] attributed to a different tree from that on which they grew.”⁴³ The net result of these cases was that residents of community property states were able to benefit from lower taxes on salary income if only one of them worked than were similarly-situated

35. 269 U.S. 315 (1926).

36. An excellent discussion of this litigation appears in Bittker, *supra* note 1, at 1404-07 and sources cited therein.

37. 282 U.S. 101 (1930).

38. H.R.J. Res. 340, ch. 495, 46 Stat. 589 (1930).

39. 282 U.S. 101 (1930).

40. 281 U.S. 111 (1930).

41. 282 U.S. at 113.

42. *Id.* at 117-18.

43. 281 U.S. at 115.

residents of common law states. But because no gift tax existed then, this disparity was not present with respect to income from property so long as the common law state residents were willing to share ownership.

Shifting property interests between spouses became costlier in 1932, when a permanent gift tax was enacted.⁴⁴ As ownership of community assets was automatically split by operation of the state community property laws, the burden of this tax fell primarily on residents of the common law states. The 1932 Revenue Act signaled a change in the direction income tax rates were to take during the next several years. The maximum rate of twenty-five percent in effect since 1928 was replaced by a new schedule with a maximum rate of sixty-three percent.⁴⁵ During the 1930s, Congress, in an attempt to balance the budget at a time when fewer people were employed and paying taxes, continually raised tax rates.⁴⁶ Again, even if only one spouse were employed, the brunt of these rate increases fell on families in common law states because income splitting was limited to the community property states.

In 1941 Congress attempted certain reforms. The House Ways and Means Committee proposed mandatory joint returns for married couples. The committee believed this change would correct five "inequities" in the law: (1) a higher tax was paid by families where only one spouse contributed to family income than by families where both spouses contributed; (2) families living in community property states paid smaller taxes than families living in other states; (3) families whose incomes were attributable to earnings paid higher taxes than families whose incomes were attributable to investments; (4) the option of filing joint or separate returns always operated to the detriment of the government and to the advantage of the taxpayers; and (5) taxes were being reduced through the use of family partnerships, gifts and trusts.⁴⁷ The second and third committee objections have been dis-

44. Revenue Act of 1932, ch. 209, § 501, 47 Stat. 245.

45. *Id.* §§ 11-12, 47 Stat. 174-77.

46. *Id.*; Revenue Act of 1934, ch. 277, 48 Stat. 680; Revenue Act of 1935, ch. 829, 49 Stat. 1014; Revenue Act of 1936, ch. 690, 49 Stat. 1648; Revenue Act of 1938, ch. 289, 52 Stat. 447.

47. H.R. REP. NO. 1040, 77th Cong., 1st Sess. 11-13 (1941).

cussed earlier in this article,⁴⁸ and the fifth is directly related to the third. The fourth objection was, of course, correct, but the first objection suffered from a basic shortcoming. The committee considered the income tax the only difference in disposable income separating a couple for whom one spouse was the sole contributor and another couple, both of whom were employed. In actuality, the second couple's work-related outlays were higher,⁴⁹ as was its other tax burden, the "Social Security" tax.⁵⁰

The Senate Finance Committee focused its reforms on the community property/common law state distinction. It would have taxed earned income to the spouse who actually earned it, taxed community investment income to the spouse having management and control thereof, and allocated deductions and credits to the spouse reporting the income to which these items related.⁵¹ None of these proposals became law.⁵²

When it became clear that Congress would grant residents of common law states no relief from what they considered oppressive tax burdens,⁵³ several state governments created their own solution. In 1939 Oklahoma adopted an elective community property law. Oregon fol-

48. See discussion at pp. 34-36 *supra*. Not every community property state spouse benefits from these income allocations. Each spouse must report one-half of the community's income even though one of them, perhaps because of marital discord, actually receives a smaller amount.

49. See discussion at pp. 41 & 45 *infra*.

50. Act of Aug. 14, 1935, ch. 531, tit. VIII, § 801, 49 Stat. 636. This tax was initially imposed at the modest rate of 1% on the first \$3,000 of wages.

51. S. REP. NO. 673 (Part 1), 77th Cong., 1st Sess. 9-11 (1941).

52. H.R. REP. NO. 1203, 77th Cong., 1st Sess. 10 (1941). The 1941 Act almost included a Senate provision that common law state residents could have used as an income splitting device had they been as imaginative as the Boyters; alimony was to be taxed to the recipient and deducted by the payor. Although deferred in conference, this provision was added to the law in 1942. Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816-17. Also enacted in 1942 were rules making the estate and gift tax provisions concerning community property more similar to those affecting property in common law jurisdictions. *Id.* §§ 402, 453, 56 Stat. 941, 953. These changes were upheld in *Fernandez v. Wiener*, 326 U.S. 340 (1945).

53. The 1938 Act provided for tax rates ranging from 4% to 79%. Revenue Act of 1938, ch. 289, §§ 11-12, 52 Stat. 452-54. The 1942 legislation raised these rates so that the range was from 19% to 88%. Revenue Act of 1942, ch. 619, §§ 102-103, 56 Stat. 802-03.

lowed suit in 1943.

In *Commissioner v. Harmon*,⁵⁴ the Supreme Court analogized the voluntariness of these self-help remedies to the contract provisions in *Lucas v. Earl*,⁵⁵ rendering them ineffective for federal income tax purposes. In the next four years, these states, along with Nebraska, Michigan, Pennsylvania, and the territory of Hawaii, adopted mandatory community property systems which the Internal Revenue Service accepted as valid.⁵⁶ With other states threatening to make this fundamental change in their basic rules of property law, Congress acted in 1948, a year in which federal revenue demands were temporarily diminished compared to what they were during World War II.⁵⁷

Rejecting the 1941 proposals as being either too costly for married individuals,⁵⁸ or unduly burdensome for couples with earned, as opposed to investment, income,⁵⁹ Congress adopted a separate tax rate schedule for married individuals.⁶⁰ If they chose to file a joint return, the married couple would pay a tax which was twice as large as the tax imposed upon a single person (or a married individual who filed separately) with one-half of their combined income. Thus, the degree of progression applied to married individuals' joint return rates was only one-half that applied to all other taxpayers, at least until each group reached the highest tax bracket.⁶¹

Little legislative activity occurred until 1969,⁶² when Congress de-

54. 323 U.S. 44 (1944).

55. 281 U.S. 111 (1930). See pp. 37-38 *supra*.

56. I.T. 3743, 1945-1 C.B. 142-43; I.T. 3782, 1946-1 C.B. 84.

57. H.R. REP. NO. 1274, 80th Cong., 2d Sess. 6, 13 (1948).

58. This criticism was made with respect to the House Ways and Means Committee proposal.

59. The Senate Finance Committee proposal was discarded on this basis.

60. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 114. This act also added estate and gift tax marital deductions and a provision allowing married couples to split the gift tax consequences of gifts either spouse made to a third party. *Id.* §§ 361, 372, 373, 62 Stat. 117-21, 125-28. These provisions gave married couples a clear advantage over unmarried individuals insofar as property arrangements were concerned.

61. *Id.* § 101, 62 Stat. 111.

62. A separate rate schedule for heads of households was enacted in 1951, thus reducing some disparities in taxation of married couples and single individuals, at least in cases where the latter group had certain family obligations. Revenue Act of 1951, ch. 521, § 301, 65 Stat. 480. In addition, a limited deduction for job-necessitated child care expenses was added to the law in 1954. Int. Rev. Code of 1954, ch. 736, § 214,

cided that the 1948 legislation produced an unnecessarily large disparity between taxes paid by married couples and by single individuals with the same income.⁶³ For example, the \$6,070 tax paid by a single individual with respect to a \$20,000 taxable income was thirty-eight percent greater than the \$4,380 paid by a married couple with the same income.⁶⁴ Any extra costs of supporting two individuals on the particular amount of income had to be offset by the economies of scale occasioned by their living arrangement and the additional savings if household tasks were undertaken by one spouse rather than by paid household help.⁶⁵ The latter advantage diminished in importance if both spouses were employed, and in that situation their combined job-related costs of earning the household's income could exceed such costs borne by the single individual. In enacting a tax rate reduction for single individuals, Congress established a rate schedule designed to limit their extra burden to twenty percent above that imposed upon married individuals enjoying the same taxable income.⁶⁶

Using rates currently in effect for 1980,⁶⁷ the relative tax burdens of single and married individuals is summarized in the following table:⁶⁸

68A Stat. 70-71. Because of the income phase-out imposed upon married individuals, single workers were more likely to benefit from this deduction than were married couples. *Id.* § 214(b)(2).

63. S. REP. NO. 91-552, 91st Cong., 1st Sess. 260-62 (1969).

64. Revenue Act of 1964, Pub. L. No. 88-272, § 111, 78 Stat. 20. Viet Nam era tax surcharges are ignored in these computations. *See, e.g.*, Pub. L. No. 90-364, § 102(a), 82 Stat. 251 (1968).

65. These computations also had to take into account the fact that no tax was imposed upon the imputed income attributable to the homemaker spouse's services.

66. S. REP. NO. 91-552, *supra* note 63, at 262.

67. Several bills providing lower tax rates for 1981 have been introduced into Congress. The extent of any future tax reduction is at best speculative, particularly in view of the revenue loss occasioned by combining a general tax cut with a reduction in the marriage penalty.

68. I.R.C. § 1. The single individual's liability would be reduced to \$17,642 if personal services were his only income source. *Id.* § 1348.

TAX PAID AT VARIOUS INCOME LEVELS

Filing Status of Taxpayer:

<u>Taxable Income</u>	<u>Married, Joint Return</u>	<u>Married, Separate Return</u>	<u>Single Individual's Return</u>
\$ 5,000	\$ 224	\$ 531	\$ 422
10,000	1,062	1,613	1,387
25,000	4,633	7,389	5,952
50,000	14,778	20,999	18,067

Since 1948, the joint return rates have been based upon the fiction that each spouse earned one-half of the couple's combined income.⁶⁹ Thus, the tax on a couple's joint return income of \$50,000 is twice the tax on separate return income of \$25,000. Married individuals benefit from this fiction whenever one spouse provides all their combined income, one spouse has a loss for the year to offset against the other's income, or one spouse's income is substantially smaller than that of the other spouse.⁷⁰ The couple described above would thus pay tax of \$14,778 using a joint return no matter how their \$50,000 income was derived. Had they filed separate returns their tax burden could have been as high as \$20,999.⁷¹ Even if both worked, separate returns would result in a combined tax exceeding \$14,778 whenever one spouse contributed more than \$27,100 (and the other, less than \$22,900) of the \$50,000.⁷²

69. While the fiction has some validity in community property states in view of the property rules there in effect, joint ownership is not a prerequisite to the use of these rates by either common law or community property jurisdiction residents.

70. The benefit ceases, depending upon income level, when the lesser-earning spouse contributes between 10% and 35%. At most income levels, the lesser earning spouse need contribute only 20% to 25% for the penalty to be felt. JOINT COMMITTEE ON TAXATION STAFF REPORT ON INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS (1980), *reprinted in* Daily Tax Report, Apr. 2, 1980, at J-1, J-8 [hereinafter cited as JCT STAFF REPORT]. Other provisions benefit married couples filing joint returns. *See, e.g.*, I.R.C. §§ 165(c)(3), 179, 1244. *See also* I.R.C. § 116, *as amended by* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 404 (Apr. 2, 1980). Still other provisions require joint filing if married couples are to avail themselves of the benefits offered. *See* I.R.C. §§ 85, 105(d), 1348.

71. This tax would result if all \$50,000 were attributable to one spouse.

72. At these income levels, each spouse has reached the 49% bracket. For every

Single individuals do not benefit from this fiction. They pay tax on their separate incomes, rather than on a pooled amount, no matter what their living arrangements. Because the rate schedule they use applies lower rates to their income than would be applied to the same amount of income produced by a married individual filing a separate return, single taxpayers living together may pay a smaller tax than that imposed upon a married couple with the same combined income. Returning to the original example involving income of \$50,000, the married couple will pay \$14,778 on a joint return no matter who earns the income; on separate returns they will pay that amount or more. Two single individuals would pay \$5,952 each, a total of \$11,904 if each earns \$25,000. Indeed, even if one of them earned more than \$27,100 (and the other, less than \$22,900), they would still pay a total combined tax lower than that paid by the married couple in most situations.⁷³ This savings, or what some commentators call the "marriage penalty" is attributable to two factors: first, rates are lower for single individuals than for married individuals filing separately; and second, income tax is paid on income in excess of a "zero bracket amount."⁷⁴ Because this amount is \$2,300 for a single individual, two such individuals are entitled to exempt from tax the first \$4,600 of their earnings.⁷⁵ A married couple is limited to a maximum of \$3,400 whether or not a joint return is filed.

It should be noted that the 1969 legislation did not raise the taxes paid by married couples; it simply did not lower them. As labor force participation by married women increased in response to such diverse factors as smaller family size, longer life expectancy, shorter marriage span,⁷⁶ better educational opportunities,⁷⁷ increased employment oppor-

dollar of income transferred from the lower to the higher earning spouse, the former's tax consequences would drop to the 43% or lower bracket while the latter's would involve the 49% or higher bracket. Thus, more of the combined income would be taxed at higher rate levels, producing a higher combined tax.

73. At the \$50,000 income level, a marriage penalty exists when the lesser earning spouse contributes as little as 20% of the combined income, a \$10,000/\$40,000 split. JCT STAFF REPORT, *supra* note 70, at J-8.

74. I.R.C. § 63(b)-(c).

75. *Id.* § 63(d)(2). Of course, each individual must have at least \$2,300 of income (in excess of the personal exemption) to take full advantage of the deduction.

76. Bureau of Labor Statistics data indicates that divorced women have the highest labor force participation rate (74%) of all women aged sixteen or older. JCT

tunities in nontraditional occupations,⁷⁸ inflation, and a higher minimum wage,⁷⁹ many couples found themselves in the situation facing David and Angela Boyter; that is, they had to pay higher income taxes because they were married.

While it appears the Boyters have failed in their particular attempt to remedy the problem of the marriage penalty for 1975 and 1976, the changes in workforce participation by married women will continue to put pressure on Congress to adopt one or more of the solutions presently before it.⁸⁰ Many couples, particularly those with minor children, will find the Boyters' successful 1977 solution an unacceptable alternative. Even if the Boyters ultimately prevail, the majority of similarly situated taxpayers will be unwilling to undergo the expense and effort involved in successive year-end divorces and the necessary year-beginning marriages.⁸¹

Evidence was introduced at a recent House Ways and Means Committee hearing that "work decisions of married women are far more sensitive to tax considerations than are those of single persons or married men."⁸² Thus, the marriage penalty may be viewed by many in Congress as vitiating the effects of federal legislation providing equal

STAFF REPORT, *supra* note 70, at J-18. In view of the shorter time span between marriage and divorce, Congress amended the social security provisions allowing survivor's benefits to a divorced spouse and now requires that the marriage have lasted only 10 years as opposed to the 20-year period previously required. 42 U.S.C. § 416(d) (Supp. II 1979), *as amended by* Pub. L. No. 95-216, tit. III, § 337(a), 91 Stat. 1548.

77. 20 U.S.C. § 1681 (1976) (originally enacted as Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373).

78. Civil Rights Act of 1964, tit. VII (codified at 42 U.S.C. § 2000e *et seq.* (1976)).

79. The minimum wage will increase from \$3.10 per hour in 1980 to \$3.35 in 1981. 29 U.S.C. § 206 (Supp. I 1977) (added by Pub. L. No. 95-151, § 2(a), 91 Stat. 1245). The Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 5(a)(2), 75 Stat. 67, had increased it to \$1.15, and further increases were enacted in 1966 and 1974.

80. At least one court held that remedies for the marriage penalty should be formulated by Congress. *Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977).

81. Any rush to the state divorce courts (assuming *Boyter* has closed the gates to Haiti and the Dominican Republic) may mobilize those institutions to ask for Congressional relief.

82. JCT STAFF REPORT, *supra* note 70, at J-10 and sources cited therein.

educational and employment opportunities for women.⁸³ Finally, to the extent that relief, whether attributable to legislation or to self-help measures, gives rise to a reduction in tax revenues, Congress would be better able to predict the size of the revenue loss and adopt offsetting measures if savings are available to taxpayers without regard to their willingness to obtain divorces.

The plethora of bills pending in Congress vary in their provisions from a deduction or credit for the dual income married couple to optional single filing status. These proposals are discussed, along with counterparts already in use at the state level, in the remainder of this article.

Deductions or Credits for Job-Related Outlays

Because married couples who are both working outside the home generally incur larger expenses for such items as meals, transportation, and clothing than do couples with one worker and one homemaker, tax deductions or credits frequently have been proposed to offset these extra costs. Although such deductions might be justified under section 162 as ordinary and necessary business expenses because they are incurred to allow the second spouse to take employment, bringing such expenditures within the umbrella of the business expense deduction is unlikely. The administrative burdens flowing from such an allowance should not be underestimated. Indeed, several issues would present themselves for immediate resolution.

First, a decision would have to be made as to which spouse's expenses would be deemed the extra costs. Possible choices include the spouse with the higher(lower) expenses, the spouse with the higher(lower) earnings, and the spouse who entered the labor force most recently.⁸⁴ Once this decision is made, Congress can then move on to the question of whether that spouse's total expenses for work-related items are to be deducted or only those outlays in excess of the amount he/she would otherwise incur. The latter choice is more satisfactory

83. 20 U.S.C. § 1681 *et seq.* (1976)(originally enacted as Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373); Civil Rights Act of 1964, tit. VII (codified at 42 U.S.C. § 2000e *et seq.* (1976)).

84. In dealing with the credit for child care outlays, Congress chose the lesser earning spouse. I.R.C. § 44A.

from a theoretical standpoint inasmuch as only such additional outlays are a necessary concomitant of earning the extra taxable income. Moreover, if the prospect of "lavish or extravagant" deductions worries Congress, automatic disallowance of the "fixed" portion of these outlays should be an acceptable solution. Incremental cost computations, although no longer used for entertainment expenses,⁸⁵ have long been an accepted practice in tax computations.⁸⁶ Subjective questions could be reduced if some statutory or administrative percentage were treated as the incremental portion of the employee's actual costs. But basing the deduction on incremental cost requires increased recordkeeping and computations, which in turn magnify both the risk of taxpayer error in computing tax liability and the cost of monitoring taxpayer compliance. While allowing the full cost of certain items as deductions reduces the computations involved, this step provides taxpayers little incentive for controlling what are to a large extent "personal, living or family expenses."⁸⁷

The real problem with allowing these items as deductions under section 162 transcends mere difficulties in administration and computation. Such outlays must be viewed as business expenses under section 162, regardless of who makes them, or they should not be treated under section 162 at all. If meals, transportation, and clothing expenses are to be deductible for the second working spouse, the same treatment should be granted those outlays when made by unmarried workers or the spouse who is the family's sole breadwinner. Since *Smith v. Commissioner*,⁸⁸ in which the Board of Tax Appeals held that the wages of a babysitter who was hired so that parents could work was not a section 162 expense,⁸⁹ a "but-for" rationale has been insufficient to justify section 162 status for outlays with a strong personal flavor. Too many years of contrary interpretation should prevent use of section 162 here; but, as the history of the child care credit⁹⁰ indicates, other means of providing relief are available.

85. *But see* Rev. Rul. 63-144, 1963-2 C.B. 129.

86. *See, e.g.*, I.R.C. § 123; Treas. Reg. § 1.213-1(e)(1)(iii)(1962).

87. I.R.C. § 262.

88. 40 B.T.A. 1038 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

89. 40 B.T.A. at 1039.

90. I.R.C. § 44A.

Congress enacted section 214 in 1954⁹¹ to provide a limited child care expense deduction for working taxpayers. Over the years this deduction has been broadened in its coverage and reformulated as a credit. There are, however, fundamental differences involved between expenditures for child care and other items of outlay, the size of which is affected by workforce participation. The cost of child care is, for the average family, a temporary phenomenon inasmuch as one's children soon reach an age where custodial care becomes unnecessary.⁹² The outlays for one's own meals and similar items continue throughout the term of workforce participation, a period of thirty years or longer. In addition, child care outlays frequently decrease after the child reaches first grade, when only after-school care costs become necessary.⁹³ With the possible exception of clothing, the worker's job-related expenses do not follow this pattern.

Perhaps the most important distinction involved between these outlays is one of underlying policy. To reduce the risk that children will be left unattended or perhaps warehoused in an inadequate (and not necessarily inexpensive) setting, the tax revenue foregone by the government could be viewed as an investment, the return from which may eventually be received in the form of a reduced juvenile crime rate. In addition, persons performing child care services may now, by virtue of Internal Revenue Service reporting requirements,⁹⁴ be spotlighted as receiving gross income which otherwise might go unreported. It is questionable whether allowing outlays for other items would serve such purposes. Because the items are already expenditures, only the incremental cost can be justified as work-related.⁹⁵ Second, because these items are

91. Int. Rev. Code of 1954, ch. 736, § 214, 68A Stat. 70-71. The discussion of this provision ignores the fact that some families send their children to nursery school even though one spouse never works outside the home.

92. I.R.C. § 44A allows no credit for care of a person age fifteen or older unless such person is incapable of caring for himself.

93. Treas. Reg. § 1.214A-1(c)(3)(1976) disallowed a deduction for educational expenses of a child in the first or higher grade. *Compare* Treas. Reg. § 1.214-1(f)(2) & (5)(Ex.3)(1956) *with* Treas. Reg. § 1.214A-1(c)(5)(Ex.2)(1976). *See also* Brown v. Commissioner, 73 T.C._____, Nos. 8592-77 & 11685-77 (filed Oct. 24, 1979).

94. Internal Revenue Service Form 2441, used for claiming the child care credit, requires the name and address of the person rendering care, the amount of money paid such person, and, in certain instances, that person's social security number.

95. *See* discussion at pp. 45-46 *supra*.

purchased from established businesses, their reporting would be of little value in increasing taxpayer compliance.

While allowing a deduction or credit for these job-related costs may not have the same appeal as that generated by child care outlays,⁹⁶ an argument can be made for tax relief to offset costs which are clearly job-induced and which do not result in benefits to the worker. The most compelling example of such a cost is the social security tax imposed upon most workers. If one spouse works and the other stays home, a participation pattern upon which the social security system is founded,⁹⁷ the employed spouse is eligible to receive from this program death benefits, disability benefits and retirement benefits based upon a formula which takes into account the amount of his covered wages.⁹⁸ The nonemployed spouse is eligible to receive retirement payments equal to a percentage of those received by the employed spouse both during that spouse's life and after his death.⁹⁹ If both spouses work, each pays the social security tax and is eligible for these benefits. However, to the extent the second spouse would be entitled to some or all of these amounts even if he or she did not work and pay this tax, the tax payment does not provide any benefits and can be considered a job-related outlay for which there are no elements of personal enjoyment. Generally, the spouse with the lower wage is the one for whom the outlay is not proportionately covered by available benefits, so that spouse is the most appropriate person to be granted any tax relief that is legislated.

As explained above, unless one is willing to argue that job-related expenses are deductible as employment-related for all workers, justifying the deduction of any outlays other than for social security taxes becomes difficult. Even a deduction in situations where the second job was necessary to lift the family above a poverty level involves a rather tenuous extension of the deduction currently allowed the moonlighting

96. See discussion at pp. 46-47 *supra*.

97. See REPORTS OF THE 1979 ADVISORY COUNCIL ON SOCIAL SECURITY, SOC. SECURITY BULL., Feb. 1980, at 3, 6, 12.

98. 42 U.S.C. §§ 402(a)&(i), 423 (1976) (benefits); *id.* § 415 (computation of primary insurance amount).

99. 42 U.S.C. § 402(b),(c),(e),(f) (1976) (benefit generally 50% of the worker spouse's benefit during that spouse's life and 100% after his or her death).

worker for transportation between jobs.¹⁰⁰ Section 43 already allows a credit for low income families, regardless of the number of workers, in situations where there is a dependent child. Moreover, in the low income situation, relief could be increased by modifying section 43 to provide a higher income phase-out for married individuals than is provided for single individuals.¹⁰¹ Differing income levels can be justified because the requirement of a dependent insures that a different minimum number of persons will be supported by the income, three for a married couple and two for other taxpayers. Because section 43 benefits are currently awarded whether one or both spouses work, such higher limits for couples might be further conditioned on both spouses having income, thus providing an alternative method of allowing for the extra costs generated by the second worker in a low income family.¹⁰²

While a deduction may be hard to fit within existing notions of what constitutes an ordinary and necessary business expense, it cannot be rejected summarily. If Congress decides that the marriage penalty is sufficiently severe to require relief, then a deduction still must be considered, not as theoretically justified but rather as one method of formulating such relief.

The decision between a credit and a deduction involves several considerations. The revenue lost if a credit is used is probably easier to predict than it would be if a deduction were chosen because the amount of tax foregone in the latter situation is dependent upon the tax rate otherwise applicable.¹⁰³ Likewise, the use of a deduction, unless it is provided for in section 62, could easily result in job-oriented deductions alone exceeding the zero bracket amount. In that situation a large percentage of persons who presently do not itemize will be forced to keep records of medical expenses, charitable contributions, and similar items.¹⁰⁴ Finally, a credit can be defended using an "ability to pay"

100. See, e.g., Rev. Rul. 55-109, 1955-1 C.B. 261, 263; Rev. Rul. 76-453, 1976-2 C.B. 86, 87 (Ex.7).

101. See, e.g., I.R.C. § 85.

102. I.R.C. § 44A, while not raising the child care credit when both spouses work, precludes its use in most situations where one does not.

103. The forecasting problem is, of course, reduced if a ceiling is placed upon the amount of the deduction.

104. On the other hand, if the deduction is listed in I.R.C. § 62, it can affect the amount of the medical expense and charitable contributions deductions taken by per-

rationale as a means of granting a proportionately higher benefit to lower income individuals. If, however, the credit were set at or below the lowest tax rate percentage, no taxpayer would be better off with a credit than with a deduction.¹⁰⁵

To the extent a credit percentage greater than the lowest marginal bracket is chosen, the amount by which the credit exceeds the savings attributable to the deduction can be viewed as a subsidy to lower income taxpayers. Such a subsidy falls short of full cost recovery, however, in at least three aspects. Unless the credit is set at one hundred percent of cost, it is not a full subsidy.¹⁰⁶ Likewise, if the credit is not refundable, it is not a subsidy to the extent it exceeds the current year's tax liability.¹⁰⁷ Finally, to the extent a taxpayer's outlays are subject to an overall dollar limitation, there is less than a full subsidy once costs exceed the limit.¹⁰⁸

The bills pending in Congress which allow a deduction¹⁰⁹ or a credit¹¹⁰ for dual income couples adopt a combination of the approaches used in computing the child care and earned income credits. These bills allow a percentage of the earned income of the spouse with the smaller earnings to be deducted or credited in computing income tax liability. They do not provide full relief, however, because the specified percentage is applied against the lesser of such income or a predetermined dollar limit.¹¹¹ Thus, the proportionate relief granted in the

sons who do itemize. Many of the bills now pending in Congress avoid both problems by providing for a deduction which is in addition to the deductions listed in § 62 but is not an itemized deduction. *See, e.g.*, H.R. 6203, 96th Cong., 1st Sess. § 1(b) (1979).

105. Exceptions to this rule could occur if the taxpayer would use the zero bracket amount and get no benefit from the deduction or if the credit were made refundable, as § 43 credits already are.

106. The earned income credit, while limited to 10% of the first \$5,000 of wages, does operate in this fashion for very low income taxpayers. I.R.C. § 43. This credit was designed to offset the effect on low income workers of social security taxes, currently 6.13% of wages. The 10% credit exceeds the full subsidy at covered wage levels of \$6,700 or less (as well as for the minority of workers whose jobs are not covered by the social security system).

107. The credit authorized by I.R.C. § 43 is refundable, however. v

108. *See, e.g.*, I.R.C. § 44A.

109. *See, e.g.*, H.R. 6822, 96th Cong., 2d Sess. (1980); H.R. 6203, 96th Cong., 1st Sess. (1979); S. 1247, 96th Cong., 1st Sess. (1979).

110. *See, e.g.*, H.R. 6798, 96th Cong., 2d Sess. (1980).

111. H.R. 6822, 96th Cong., 2d Sess. (1980), would allow a deduction equal to

higher brackets is limited, and a marriage penalty would still remain to some extent.¹¹²

These proposals have several virtues: first, they involve fewer computational difficulties than would be involved in allowing an offset for actual costs or in allowing married individuals to file as single individuals;¹¹³ second, they limit the revenue loss engendered by such relief.¹¹⁴ As between a deduction and a credit, it has been calculated that a credit "would not be as effective as a deduction, per dollar of revenue loss, in reducing marginal tax rates in the high income brackets, where high marginal rates present the most serious problems."¹¹⁵

Because these proposals are limited to a percentage of earned income, disparity of treatment still will remain between married and unmarried couples deriving income from investments. This disparity is relatively more burdensome in one regard: income from investments is not eligible for the maximum tax rate of fifty percent applied to earned income.¹¹⁶

the lesser of \$2,000 or 10% of the earned income of the spouse with the smaller earnings. This bill differs from the other deduction bills listed in note 109 *supra* in that its relief is granted only if the lesser earning spouse's earned income is at least 20% of the spouses' combined income. See the discussion at note 70 *supra*.

112. As the JCT STAFF REPORT indicates, "a cap means that there would be no reduction in the marginal tax rate on a second earner whose earnings exceeded the cap" JCT STAFF REPORT, *supra* note 70, at J-15.

113. See discussion at pp. 45-46 *supra* and at pp. 53-58 *infra*.

114. The JCT STAFF REPORT, *supra* note 70, at J-14 to J-16, provides the following estimates of revenue loss: a 20% deduction with a \$20,000 cap would decrease revenues \$7.1 billion; a 10% deduction with no cap would decrease revenues \$3.7 billion; and a 10% deduction with a \$10,000 cap would decrease revenues \$3.2 billion. A 10% credit would result in an \$11.7 billion loss even with a \$10,000 earnings cap. On the other hand, the revenue loss from optional separate filing would range between \$7.0 billion and \$8.7 billion, depending upon how deductions and investment income were allocated. *Id.* at J-14. Mandatory separate filing, because of its effect on one-earner couples, would actually increase federal revenues by as much as \$18.1 billion. *Id.* at J-13.

115. *Id.* at J-16.

116. I.R.C. § 1348. Once *each* wage earner has earned income in excess of the amount taxed at rates of 50% or less, the flat 50% rate comes into effect and there is no additional discrimination between married and unmarried workers. This effect occurs at a much higher level of income with respect to investment income, which can be taxed at rates as high as 70%.

However, the discrimination does not always work against the married couple. If two individuals receive substantial amounts of income from property, as opposed to salaries, they probably will pay a lower tax if they remain single. However, if substantially all such income is received by one of them, a joint return favors the married couple. The married couple also has an advantage over the unmarried couple because the marital deduction is available to allow tax-free inter vivos transfers of property between spouses.¹¹⁷

Mandatory and Optional Separate Filing

As an alternative means of providing relief, several bills would permit married individuals to file separate returns using the rates applied to single individuals. While most of these bills present this filing status as an option,¹¹⁸ a few of them would make separate filing mandatory.¹¹⁹ In those situations where the existing joint return/separate return rules give rise to a marriage penalty, optional or mandatory use of the single return rates would provide almost complete relief. However, in those situations where the married couple's income is earned primarily by one spouse, the present system results in lower taxes. Mandatory separate returns could thus result in increased taxes.¹²⁰

Compulsory separate returns were effectively the rule prior to

117. I.R.C. § 2523. Because up to \$100,000 of property can be transferred free of gift tax, the income from this \$100,000 can be shifted free of tax consequences. There may be a \$50,000 reduction in the ultimate estate tax marital deduction, but this would usually be insignificant if income shifting were the goal, because the effect of such reduction would not be felt until a future period. *See* I.R.C. § 2056.

118. *See, e.g.*, H.R. 5012, 96th Cong., 1st Sess. (1979).

119. *See, e.g.*, H.R. 4467, 96th Cong., 1st Sess. (1979). These bills use present joint return rates. They would also ignore community property allocations and tax earned income to the spouse performing the services. *Id.* § 1(b)(1). While these bills are generally treated as requiring separate filing, their actual effects are a return to the pre-1948 rules and equality of treatment for common law and community property state residents.

120. Such increases would occur at every income level, but the relative percentage of returns affected adversely would be greatest at family income levels below \$15,000 and above \$30,000, at least in situations where investment income and deductions were allocated pro rata based upon earned income. JCT STAFF REPORT, *supra* note 70, at J-14.

1948.¹²¹ Their use would once again reinstate the distinction between salary earners and persons deriving substantial amounts of income from property and the distinction between community property and common law state residents. While schemes such as those proposed in 1941¹²² could be appended to such a measure, mandatory separate returns are unlikely to gain taxpayer support from any group other than single individuals.¹²³

Optional separate filing creates a situation similar to that recognized by the House Ways and Means Committee in 1941; that is, it always will be employed to the detriment of the government. This objection loses much of its force, however, if the proposal is viewed as a taxpayer relief measure from which the government is expected to lose revenue.

Among the objections that have been raised to proposals allowing married individuals to compute their taxes as if they were single are those relating to the size of the revenue loss, complexities in record-keeping, and notions of equity toward single individuals who would not be granted that alternative. The revenue loss caused by optional separate filing using single rates could be substantially greater than the loss caused by allowing a deduction or credit.¹²⁴ But in theory, the same amount could be lost if every married couple who would benefit from this proposal obtained a year-end divorce.

Alluding to this potential run to the divorce courts does not detract from the certain revenue loss that approved separate filing would bring. Indeed, Congress could prevent a self-help solution by adopting a new definition of marital status, such as being married more than one-half of the year or being married any time during the last half of the year.¹²⁵ Alternatively, a rate schedule could be developed for cohabiting individuals to solve the problem raised by the Boyters' second solution.¹²⁶

121. See discussion at pp. 34-40 *supra*.

122. See discussion at pp. 38-39 *supra*.

123. Residents of community property states and couples deriving their entire income from investments may, however, remain neutral.

124. See note 114 *supra*.

125. See, e.g., I.R.C. §§ 143(b)(1), 542(a)(2).

126. This alternative was not discussed in the JCT STAFF REPORT, *supra* note 70. It is discussed in Bittker, *supra* note 1, at 1398-99, and rejected as unfeasible.

Another means of reducing the revenue loss would be to modify the gift and estate tax marital deduction provisions. A reduction of the allowable marital deduction could be implemented using a formula designed to compensate the government for income taxes lost when a couple files as single individuals. Such a modification can be justified theoretically. If the couple had remained single, they would not have been entitled to any marital deduction at all. To the extent that marital status confers detriments a couple wishes to avoid, its benefits should be treated in a consistent fashion.

Obviously, using the marital deduction to offset revenue losses has its drawbacks. First, couples who benefit from joint returns will not be affected, and they are frequently the couples deriving the greatest benefit from the marital deduction.¹²⁷ Second, the proposal introduces yet another set of calculations into each couple's decision about filing status—this new set involving at best hypothetical facts as to future gift and estate taxes. Finally, the need for the marital deduction is removed if the couple is willing to obtain a divorce each time their wealth is held in a sufficiently disparate fashion. Expeditious use of section 2516 will thus reintroduce the question of sham in a context slightly different from that in *Boyer*.¹²⁸

The complexity involved in optional separate filing stems from the fact that married couples would have to do at least three separate computations of taxable income and tax: his, hers, and theirs. The computations of the separate incomes would be complicated further by the recordkeeping requirements necessary to determine which items of income and deduction are allocable to each spouse.¹²⁹ While this added complexity no doubt would be an inconvenience both for the taxpayer and for the government, it is presently a fact of life for residents of several states, among them Ohio, New York and North Carolina.

127. High income couples who benefit from joint returns probably do so as to both earned and investment income and can use the marital deduction to reduce taxation on transfers of property producing the latter. Their ability to do so was significantly expanded by the changes in the gift tax marital deduction enacted in 1976. See I.R.C. § 2523.

128. Unlike the marital deduction provided by I.R.C. § 2523, the benefits of I.R.C. § 2516 are not subject to dollar or percentage limitations.

129. These problems involve more than a decision between separate and joint checking accounts.

Ohio residents already are forced to do what the optional single filing status bills would require: that is, compute their taxes jointly and separately and decide which is more advantageous. In fact, the Ohio computation must be done twice, as state income taxes also must be considered. Because Ohio has only one rate schedule,¹³⁰ used by all taxpayers regardless of filing status, a joint state return would result in a higher tax¹³¹ than would separate returns whenever each spouse had positive income.¹³² Filing a joint state return also would result in a lower state tax if one spouse had a loss to offset against the other spouse's income.

Obviously, the Ohio system favors the filing of separate state returns. Nevertheless, joint returns comprise the majority of filings,¹³³ because Ohio law requires married individuals to use the same filing status in filing their state returns as they use in filing their federal returns.¹³⁴

As discussed earlier in this article, married individuals are rarely benefited by filing separate federal returns,¹³⁵ but the earlier discussion proceeded on the assumption that only federal tax liability was relevant. As Ohio taxpayers are frequently able to benefit from separate state returns, some married couples are forced every year to make six different tax computations to ascertain the lowest possible tax liability.¹³⁶ Because the maximum amount that can be saved by filing separate state returns is five hundred dollars,¹³⁷ the couple's computations

130. OHIO REV. CODE ANN. § 5747.02 (Page 1980).

131. Like most other states, Ohio has a graduated rate schedule so that the tax rate increases as income rises. *Id.*

132. There will be no marriage penalty if (1) the couple's total taxable income was \$5,000 or less or (2) one spouse's income was less than the personal exemption.

133. [1978] OHIO DEP'T OF TAX ANN. REP. 54-55.

134. OHIO REV. CODE ANN. § 5747.08(E) (Page 1980).

135. *See* pp. 42-43 *supra*.

136. Computations of each spouse's taxes and of their combined tax are required at both the state and federal levels. Additional federal computations may be required to ascertain eligibility for income averaging or the maximum tax on personal service income. *See* I.R.C. §§ 1301, 1348.

137. The first \$40,000 of income is taxed at graduated rates, with a maximum tax of \$900. All income in excess thereof is taxed at a flat 3 ½%. If each spouse earned \$40,000, the second spouse's tax before credits would be \$900 on a separate return and \$1,400 on a joint return.

are eased considerably if they start at the federal level and find that joint federal returns save them more than that amount.¹³⁸

The computation should also begin with the federal returns because the Ohio taxable income computation is based upon federal adjusted gross income. Thus, even in those cases where multiple computations are needed to determine which income combination yields the smallest tax, the computations are not as complex as those required in New York or North Carolina.

A typical family that will pay a smaller overall tax filing separately for both Ohio and federal purposes is one in which both spouses earn a salary of \$10,000. The couple has no dependents, income other than salary, or deductions beyond the zero bracket amount. Their combined Ohio joint return income would be \$18,700; on a separate return each would report \$9,350. Their combined federal joint return income would be \$18,000; on separate returns each would report \$9,000. Their comparative tax liabilities are illustrated in the table below, which is based upon tax liability before credits.

TAXES PAID: FEDERAL AND OHIO

Jurisdiction	Joint Return	Separate Returns
Federal	\$2,745.00	\$2,745.00
Ohio	<u>267.50</u>	<u>137.00</u>
Combined	\$3,012.50	\$2,882.00

Ohio does provide a partial reduction in the extra tax burden imposed upon working couples who file joint returns. A credit against the income tax is allowed whenever both spouses have federal adjusted gross incomes of five hundred dollars or more from nonpassive sources.¹³⁹ The joint filing credit is a sliding percentage of the tax otherwise due.¹⁴⁰ Like the federal credits which have been proposed, the Ohio credit does not purport to offer complete relief from the additional tax paid by those filing joint returns.¹⁴¹ While optional filing sta-

138. The federal computations will frequently take into account items that are not involved in Ohio tax computations, such as the requirement of a joint return if a child care credit is claimed. I.R.C. § 44A(f)(2).

139. OHIO REV. CODE ANN. § 5747.05(I) (Page 1980).

140. *Id.*

141. The maximum credit of 20% is available only if taxable income is \$10,000

tus has been proposed in the past in Ohio, thus far it has been rejected as involving too great a revenue loss.¹⁴² Should the federal government now adopt one of the optional filing status bills, Ohio, unless it changes its existing law, will find that a larger number of its residents will be filing separate state returns.

New York residents have far more freedom of choice than their counterparts in Ohio. They are allowed to file separate state returns even though joint federal returns are utilized.¹⁴³ Because New York's state tax rates are graduated steeply,¹⁴⁴ married individuals frequently find separate state returns advantageous. So long as individuals remain married, however, joint federal returns almost always are preferable to separate returns using the existing rate schedules.

The complexities inherent in the New York return situation stem primarily from allocation problems: records must be kept which can be used to compute each spouse's proper share of the combined income and deductions reported on the federal return. The same problem of allocation exists in North Carolina, which has yet a third solution to the problem of how married couples are to be treated for tax purposes.

North Carolina, which like Ohio and New York has only one rate schedule,¹⁴⁵ does not allow the filing of joint state returns.¹⁴⁶ Because its standard deduction is relatively low,¹⁴⁷ itemized deductions are common, and North Carolina residents are quite proficient at gathering the data necessary to compute two separate state returns¹⁴⁸ and either separate or joint federal returns.

One means of reducing the recordkeeping problems, as well as re-

or less. *Id.*

142. Letter from Richard A. Levin, Research Director, Ohio Department of Taxation, to Gail Levin Richmond (July 22, 1980).

143. N.Y. TAX LAW § 611 (McKinney 1975).

144. *Id.* § 602(d) (McKinney Supp. 1979). The rates run from 2% to 14%.

145. Compare N.C. GEN. STAT. § 105-136 (1979) with GA. CODE ANN. § 91A-3601(b)(1980).

146. N.C. GEN. STAT. § 105-152(e) (1979).

147. *Id.* § 105-147(22) (lesser of 10% of adjusted gross income or \$550).

148. Even single individuals are required to keep multiple records, because North Carolina allows several deductions not permitted in federal computations. *Id.* § 105-147(6)&(7) (federal airline excise tax; federal telephone excise tax; employer's share of FICA tax on household help; a percentage of dividends received from corporations having income allocable to North Carolina).

ducing the avoidance problems which could result if the bulk of deductions were taken by the spouse with the higher income, would be to adopt the method which is already in use for couples when one spouse is averaging income. While gross income and deductions authorized in computing adjusted gross income are allocated to the spouse who produced them, all other deductions are prorated between the spouses using the ratios of their respective adjusted gross incomes.¹⁴⁹ The same allocation method is used in computing the maximum tax on earned income, in this context to differentiate between earned and unearned income as opposed to husband's and wife's income.¹⁵⁰ In addition, to reduce the government's data checking difficulties, the optional single returns could have two columns, as is done in many states.¹⁵¹ Each spouse's income and deductions then would appear on the same form. Thus, while complexity clearly will be increased using single filing status, the extent of such increase need not be unmanageable.

The problem of providing equitable relief for single individuals takes the entire discussion full circle to the changes which were made in 1948 and 1969. In testifying before the House Ways and Means Committee, a Treasury Department official noted four goals by which tax policy has been guided: the income tax should be progressive; married couples with equal combined income should pay the same tax; a tax penalty should not be imposed on marriage; and a tax penalty should not be imposed on becoming or staying single.¹⁵²

As the official astutely noted, it is impossible to achieve all four goals simultaneously.¹⁵³ Perhaps the best that can be done at this time is to chip away at the marriage tax penalty rather than to eliminate it, thus limiting the unfairness caused to single individuals. In deciding among various remedies, Congress must, of course, consider federal revenue loss. However, it should not neglect an examination of alternatives already in use at the state level and of the effect its decision will have on states such as Ohio. No matter what is done by Congress in

149. See, e.g., Treas. Reg. § 1.1304-3(c)(1966).

150. I.R.C. § 1348(b)(2).

151. E.g., North Carolina and New York.

152. *Hearings on Income Tax Treatment of Married Couples and Single Persons Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess., reprinted in *Daily Tax Report*, Apr. 2, 1980, at J-20 (statement of Emil Sunley).

153. *Id.*

the 1980s, the likelihood of eliminating all objections and self-help remedies is minute. Indeed, as Bittker stated in 1975, “the chosen solution will itself turn out, sooner or later, to be a problem.”¹⁵⁴

154. Bittker, *supra* note 1, at 1463.

APPENDIX I

BILLS INTRODUCED IN THE 96TH CONGRESS

A. Deduction Allowed Based Upon Earnings of Lesser-Earning Spouse

S.	H.R.		
1247	5829*	6822	7679
1877	6203	7015	
2940			

B. Credit Allowed Based Upon Earnings of Lesser-Earning Spouse or Other Formula

S.	H.R.	
3032	6798	8199

C. Optional Separate Filing

S.	H.R.			
336	684	3386	4884	7935
	1012	3609	5012	
	1095	3742	5815	
	3085	4696	7788	

D. Mandatory Separate Filing

H.R.			
108	1390	2553	4467
140	1936	2916	4695
207	2077	3077	6209
1295	2268	3256	7975

*The Carter Administration has adopted the approach embodied in H.R. 5829.

APPENDIX II

STATE INCOME TAX PROVISIONS

A. States Imposing No Income Tax

Florida	South Dakota	Washington
Nevada	Texas	Wyoming

B. States Imposing No Income Tax on Earned Income

Connecticut	New Hampshire	Tennessee
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C. States Imposing an Income Tax at a Flat Rate

Illinois	Massachusetts	Pennsylvania
Indiana	Michigan	

D. States Imposing an Income Tax at a Flat Percentage of Federal Liability

Nebraska	Rhode Island	Vermont
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E. States Imposing an Income Tax Using Multiple Graduated Rate Schedules

1. States in Which Single Individuals Use the Same Rate Schedule as Married Individuals Filing Separate Returns

Alaska*	Idaho	Oklahoma
Arizona	Kansas	Oregon
California	Louisiana	West Virginia
Hawaii	Maine	

2. States in Which Single Individuals Use a Lower Rate Schedule than Do Married Individuals Filing Separate Returns

Georgia	New Mexico	Utah
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F. States Imposing an Income Tax Using One Graduated Rate Schedule

1. States Requiring Joint State Returns When Joint Federal Returns Are Used

New Jersey	Ohio
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2. States Allowing or Requiring Separate State Returns

Alabama	Maryland	North Carolina
Arkansas	Minnesota	North Dakota
Colorado	Mississippi	South Carolina
Delaware	Missouri	Virginia
Iowa	Montana	Wisconsin
Kentucky	New York	

*before the September 1980 repeal of the Alaska income tax

1980 Florida Legislature — Drug Paraphernalia Banned: Florida Statutes 893.145-893.147.

With the adoption of Florida Statutes §§893.145, 893.146, and 893.147,¹ the Florida Legislature has escalated the battle to prohibit

1. FLA. STAT. §§ 893.145-47 (Supp. 1980):

893.145 Drug paraphernalia defined. The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterances, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use,

the possession, manufacture, sale and advertisement of drug parapher-

or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

- (a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.
- (b) Water pipes.
- (c) Carburetion tubes and devices.
- (d) Smoking and carburetion masks.
- (e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.
- (f) Miniature cocaine spoons, and cocaine vials.
- (g) Chamber pipes.
- (h) Carburetor pipes.
- (i) Electric pipes.
- (j) Air-driven pipes.
- (k) Chillums.
- (l) Bongs.
- (m) Ice pipes or chillers.

893.146 Determination of paraphernalia. In determining whether an object is drug paraphernalia, a court or other authority or jury shall consider, in addition to all other logically relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use.
- (2) The proximity of the object, in time and space, to a direct violation of this act.
- (3) The proximity of the object to controlled substances.
- (4) The existence of any residue of controlled substances on the object.
- (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- (6) Instructions, oral or written, provided with the object concerning its use.
- (7) Descriptive materials accompanying the object which explain or depict its use.
- (8) Any advertising concerning its use.
- (9) The manner in which the object is displayed for sale.
- (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor

nalía. Taken with some modifications from the Model Drug Paraphernalia Act (MDPA),² the new statutes are the latest in Florida's attempts to stem the tide of increasing drug abuse.

Not a unidimensional conflict, Florida's struggle reflects our society's drug dilemma. A nationwide study of high school seniors during 1975-79 showed an appreciable rise in illicit drug use, particularly marijuana and cocaine. Trends in use at lower grade levels showed mari-

or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

893.147 Possession, manufacture, delivery, or advertisement of drug paraphernalia;

(1) Possession of drug paraphernalia. It is unlawful for any person to possess drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(2) Manufacture or delivery of drug paraphernalia. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this act. Any person who violates this section is guilty of a felony of the third degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(3) Delivery of drug paraphernalia to a minor. Any person 18 years of age or over who violates subsection (2) by delivering drug paraphernalia to a person under 18 years of age is guilty of a felony of the second degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(4) Advertisement of drug paraphernalia. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

2. DRUG ENFORCEMENT AGENCY, DEP'T OF JUSTICE, MODEL DRUG PARAPHERNALIA ACT (1979) [hereinafter cited as MDPA].

juana use rising steadily at all grades down through the eighth grade.³ Florida's own intense problem is demonstrated by U.S. Customs statistics showing that almost 44% of the cocaine seized nationwide in 1978-79 was in the Miami district.⁴

Supporting drug paraphernalia laws are parents groups, the Drug Enforcement Administration of the U.S. Department of Justice, state and local law enforcement agencies, the White House,⁵ and various state and local bodies, including the Florida Legislature. From their perspective, the legal sale of drug paraphernalia encourages drug abuse, particularly among children and teens, through easy availability of drug accessories. Peter Bensinger, administrator of the Drug Enforcement Administration, presented their arguments in his statement before the House Select Committee on Narcotic Abuse and Control, "the paraphernalia industry, by its very existence . . . is condoning — even advocating — the use of illegal controlled substances."⁶ He further characterized the paraphernalia industry as a "multi-million dollar big business that facilitates and glamorizes drug use"⁷ while preying on the drug fantasies of youth. It is a natural step from this point of view to an attack on the "head shops"⁸ that distribute drug accessories. Parents' groups participate by lobbying for state and local laws, pressuring merchants, and waging fierce public relations campaigns.⁹ Even McDonald's joined the fight by changing the design of its coffee stirrers when drug users were discovered using them to inhale cocaine and PCP, an animal tranquilizer¹⁰ commonly known as angel dust. The

3. L. JOHNSON, J. BACHMAN, & P. O'MALLEY, 1979 HIGHLIGHTS: DRUGS AND THE NATION'S HIGH SCHOOL STUDENTS, FIVE YEAR NATIONAL TRENDS (DHEW Pub. No. (ADM) 80-930 1979).

4. NAT'L INSTITUTE ON DRUG ABUSE, *Drug Abuse Indicator Trends*, 1 PROCEEDINGS 115 (1979).

5. Myers, *DEA Legal Counsel Official Explains Paraphernalia Issue*, 10 NARCOTICS CONTROL DIG. 6 (1980).

6. *Hearings of the House Select Committee on Narcotics Abuse and Control*, 96th Cong., 1st Sess. (1979) (statement of Peter Bensinger).

7. *Id.* at 1.

8. *See* High Ol' Times, Inc. v. Busbee, 449 F. Supp. 364, 366 n.2 (1978) for a definition.

9. Satchell, *Head Shops: Gateway to the Drug Scene*, Fort Lauderdale News/Sun Sentinel, June 15, 1980, (Parade Magazine), at 5, col. 4.

10. N.Y. Times, Dec. 8, 1979, §1, at 8, col. 6.

fight continues in Florida with the advent of sections 893.145-893.147.

Aligned against these groups are head shop owners, the paraphernalia industry, and libertarians. In their view, anti-paraphernalia laws penalize legitimate businesses and deprive adults of their free speech¹¹ and property rights through their vagueness, overbreadth and propensity to selective enforcement. They allege further that anti-paraphernalia laws are absurd and impractical, akin to "banning swizzle sticks to prevent alcoholism."¹² In addition, they point to the disparity between the trend toward decriminalizing marijuana while imposing criminal sanctions on possession of paraphernalia.¹³

Historical Background

Although expanding drug use and the mushroom-like growth of the accessories industry have sparked renewed interest in anti-paraphernalia laws, this conflict is not a new one. Nor is it Florida's first experience with drug paraphernalia laws. In 1969, Florida enacted its first statute prohibiting both possession and sale of drug paraphernalia. However, only a few possession cases¹⁴ and no sale cases arose under that statute. The sale prohibition was consequently repealed when Florida adopted the Uniform Controlled Substances Act in 1973.¹⁵

Florida's 1969 provision was similar to general "implements of crime"¹⁶ laws, with the added element of intent that the "device, con-

11. Antanoff, *Those Mothers Are Trampling Adult Rights*, 59 HIGH TIMES 8 (1980). The Florida Bar was also opposed to Senate Bill 291 on the latter two grounds, Fla. Bar News, May 15, 1980, at 10, col. 3.

12. Antanoff, *supra* note 11, at 8.

13. *Id.*

14. Kirtley v. State, 245 So. 2d 282 (Fla. 3d Dist. Ct. App. 1971); Goble v. State, 324 So. 2d 97 (Fla. 4th Dist. Ct. App. 1975); Turner v. State, 329 So. 2d 360 (Fla. 1st Dist. Ct. App. 1976); Davis v. State, 371 So. 2d 721 (Fla. 1st Dist. Ct. App. 1979); Dacus v. State, 307 So. 2d 505 (Fla. 2d Dist. Ct. App. 1975); Merit v. State, 342 So. 2d 993 (Fla. 4th Dist. Ct. App. 1977); Falin v. State, 367 So. 2d 675 (Fla. 3d Dist. Ct. App. 1979); D.M.M. v. State, 275 So. 2d 308 (Fla. 2d Dist. Ct. App. 1973).

15. Florida adopted the major provision of the U.S.C.A. with numerous variations, omissions and additions in The Florida Comprehensive Drug Abuse Prevention and Control Act. 9 Uniform Laws Annotated 190 (1979).

16. Christianson, *Heroin Paraphernalia: Breakdown of a Fix*, 10 CRIM. L. BULL. 493 (1974).

trivance, instrument, or paraphernalia be used for unlawfully"¹⁷ administering any controlled substance. Today the Drug Enforcement Administration uses the implements of crime analogy to support the MDPA, comparing it to other federal paraphernalia laws.¹⁸ However, it was that same analogy which weakened some prior implement of crime statutes. In *Rosenberg v. United States*,¹⁹ the District of Columbia Court of Appeals held that lactose, dextrose, quinine, and gelatin capsules were not "instruments," "tools," or "implements" within the meaning of a statute making it illegal to possess the implements of a crime.²⁰ In 1973, the same court reversed the appellant's conviction in *Williams v. United States*.²¹ The Court found that the possession of a small, wooden pipe without further evidence as to its shape and size, and absent evidence as to nature and significance of marijuana residue, did not have the "sinister" implication of possession of the implements and tools of a crime.²² Mere possession of the pipe was not sufficient to support a conviction of possessing the implements of a crime, e.g., narcotics paraphernalia.

The general "implements of crime" statutes have another flaw in their application to non-traditional drug paraphernalia. That flaw is the inability of statutes initially drawn up for heroin control²³ to extend to other items such as the rolling papers used with marijuana, the pipes used with hashish, and the mirrors and razor blades used with cocaine. The items used to administer these controlled substances are far removed from the more blatant paraphernalia of heroin use, and are not commonly thought of as narcotics paraphernalia. This common experience provided the underlying reasoning in *Cole v. State of Oklahoma*²⁴

17. FLA. STAT. § 893.13(3)(a)(4) (1969).

18. Myers, *supra* note 5, at 6. Myers cites examples in which the DEA compares drug paraphernalia laws to federal firearms statutes (26 U.S.C. § 5845), moonshine paraphernalia laws (26 U.S.C. § 5686), wagering paraphernalia laws (18 U.S.C. §§ 1952, 1953), counterfeiting paraphernalia statutes (18 U.S.C. § 492), wiretapping and eavesdropping paraphernalia statutes (18 U.S.C. § 2512), and illicit tobacco paraphernalia statutes (26 U.S.C. § 5763).

19. 297 A.2d 763 (D.C. 1972).

20. *Id.* at 766.

21. 304 A.2d 287 (D.C. 1973).

22. *Id.* at 289.

23. Christianson, *supra* note 16, at 508-10.

24. 511 P.2d 593 (Okla. Crim. App. 1973).

where that state's drug paraphernalia statute was found invalid. The court noted that a person of ordinary intelligence could not determine what was or was not legal to possess.²⁵

Although Florida attempted to cure the flaw of a general implements of crime statute by adding the element of criminal intent, the provision was unsatisfactory from a prosecutorial point of view. Depending on the charges, possession of narcotics paraphernalia could either be a felony of the third degree or a misdemeanor of the first degree.²⁶ Failure to charge a felony in informations and confusion by trial courts in classifying offenses caused sentences to be reduced.²⁷

The standard of actual knowledge²⁸ found necessary by the courts was also difficult to prove. Evidence of possession was legally insufficient unless it could be shown by direct evidence that the defendant had actual knowledge of the presence of drug paraphernalia, or unless there was sufficient circumstantial evidence from which a jury could lawfully infer such knowledge.²⁹

Possession of narcotics paraphernalia was frequently tacked onto charges of possession of a controlled substance³⁰ in an effort to obtain convictions by broadening the charges. In light of these circumstances, it is likely that Florida prosecutors would have joined with the *Rosenberg*³¹ trial judge's appeal for a "comprehensive and up-to-date narcotics paraphernalia statute."³² The inadequacy of implements of crime statutes in dealing with non-traditional narcotics paraphernalia meant the struggle was not over.

Analysis of Florida's New Drug Paraphernalia Statute

The Drug Enforcement Administration presented the MDPA to states and local communities as the next strategy in the fight against drug abuse.³³ In adopting a modified version of the act, Florida endeav-

25. *Id.* at 595.

26. 371 So. 2d 721.

27. *Id.*; 329 So. 2d 360; 342 So. 2d 993.

28. 275 So. 2d 308; 245 So. 2d 282; 324 So. 2d 97.

29. 324 So. 2d at 98.

30. 245 So. 2d 282; 307 So. 2d 505; 324 So. 2d 993; 324 So. 2d 97.

31. 297 A.2d 763.

32. *Id.* at 766.

33. MDPA, *supra* note 2, at Prefatory Note.

ors to go far beyond the short statutory paragraph³⁴ which formerly dealt with drug paraphernalia. The new statute includes a definition of drug paraphernalia and gives common examples, provides a procedure for determining whether the object is drug paraphernalia, and prohibits possession, manufacture, delivery, and advertisement of drug paraphernalia.³⁵ It also amends two current sections of Florida Statutes to provide for the forfeiture of drug paraphernalia and to delete provisions relating to drug paraphernalia respectively.³⁶ Penalties,³⁷ a severance clause,³⁸ and an effective date³⁹ complete the law. Florida's new statute differs, however, from the original language of the MDPA,⁴⁰ particularly, in one critical area.⁴¹ The section prohibiting possession of drug paraphernalia does not include the intent element embodied in the original language "to use, or to possess with intent to use . . . in violation of this act."⁴²

At this point, two crucial inquiries must be presented for consideration. First, can the new statute survive challenges that it violates constitutional guarantees of due process and equal protection? Second, will the new statute be an effective tool in controlling drug abuse?

In response to these questions, MDPA proponents contend that it contains all the elements necessary to succeed where other statutes and ordinances have failed.⁴³ In support of this, they refer to *Record Revolution, No. 6, Inc. v. City of Parma*⁴⁴ and *World Imports, Inc. v. Woodbridge Township*,⁴⁵ where MDPA-based ordinances nearly identi-

34. FLA. STAT. § 893.13(3)(a)(4) (1969).

35. FLA. STAT. § 893.145-47 (Supp. 1980).

36. FLA. STAT. §§ 893.12(2), 13(3)(a) (1969).

37. FLA. STAT. § 893.13(3)(a) (Supp. 1980).

38. FLA. STAT. § 893.13(6) (Supp. 1980).

39. FLA. STAT. § 893.13(7) (Supp. 1980) (effective date October 1, 1980).

40. MDPA, *supra* note 2.

41. *Florida Businessmen for Free Enterprise v. Florida*, No. TA 80-0954, slip op. at 6 (N.D. Fla. Sept. 30, 1980).

42. *Cf.* text of FLA. STAT. § 893.146(11) (Supp. 1980) cited in note 1 *supra* (deletion of the intent requirement).

43. *See* MDPA, Prefatory Note and comments at 6; Florida Prosecutor, Aug. 1980, at 1.

44. No. C-80-38 (N.D. Ohio Apr. 14, 1980), currently on appeal to the Sixth Circuit Court of Appeals.

45. No. 80-1414 (D.N.J. June 8, 1980).

cal to Florida's new statute were held constitutional.

While there has been a rash of current cases⁴⁶ challenging drug paraphernalia statutes and ordinances, most of these statutes have not been MDPA-based. Again, however, the lack of intent in the possession section of the Florida statute distinguishes it from the statutes dealt with in those cases.⁴⁷ The arguments presented in these cases, however, have relevance in challenges to MDPA-based laws, such as Florida's. The success of the new law can be predicted to some extent from the experience of other jurisdictions, and from the experience of some Florida cities and counties⁴⁸ which enacted drug paraphernalia laws prior to and contemporaneous with state adoption of the MDPA.⁴⁹

The primary grounds for the challenge of most drug paraphernalia laws have been similar, i.e. (1) violation of the due process clause of the fourteenth amendment by being both vague and overbroad, (2) denial of the equal protection clause of the fourteenth amendment, and (3) impermissible burden on interstate commerce.⁵⁰ It was on the first basis that Indiana's statute⁵¹ was found invalid.⁵² Not only did it un-

46. *Geiger v. City of Eagan*, 618 F.2d 26, 28 n.5 (8th Cir. 1980) gives a list of such cases:

Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, No. 78-C-2114 (N.D. Ill. Feb. 11, 1980); *Indiana Chapter NORML v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (en banc); *Mid-Atlantic Accessories Trade Ass'n v. Prince George's County*, No. B-79-2385 (D. Md. Dec. 21, 1979); *Record Museum v. Lawrence Township*, 481 F. Supp. 768 (D.N.J. 1979); *Tobacco Road, Inc. v. City of Norre*, No. 70-71000 (E.D. Mich. June 20, 1979); *Cardarella v. City of Overland Park*, No. 86246 (Kan. Dist. Ct. Feb. 8, 1980); *Weingart v. Town of Oyster Bay*, No. 79-C-2932 (E.D.N.Y. Dec. 17, 1979).

47. No. TA 80-0954, slip op. at 6-7 (N.D. Fla. Sept. 30, 1980).

48. See *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980); *Florida Businessmen for Free Enterprise v. Pinellas County*, No. 80-482 Civ-T-H (M.D. Fla. May 18, 1980). See also FBFEE, *Florida Newsletter*, Apr. 15, 1980, at 1.

49. *Id.*

50. No. C-80-38, slip op. at 5 (N.D. Ohio Apr. 14, 1980).

51. IND. CODE §§ 35-24.1-4-8 (1971) (repealed 1975); 35-48-4-8 (1971) (amended 1977). For an article discussing Indiana's experience prior to 1976, as well as a discussion of Florida's statute, see Note, *Paraphernalia for Marijuana and Hashish Use; Possession Statutes and Indiana's Pipe Dream*, 10 VAL. U.L. REV. 353 (1975-76).

52. No. TH-75-142-C (S.D. Ind. Feb. 4, 1980) (en banc).

constitutionally fail to meet due process requirements of definiteness and notice to those subject to the sanction, it also provided insufficient guidelines to those charged with enforcing the law.⁵³

Vagueness and overbreadth existed because many objects arguably within the scope of the statute included instruments which could be used for legitimate purposes as well as for the administration of drugs.⁵⁴ This reasoning also played a role in *Bambu Sales, Inc. v. Gibson*,⁵⁵ where a major distributor of cigarette papers obtained a declaratory judgment. While the ordinance challenged in *Bambu* was specific rather than vague, it was overbroad since it included articles with "overwhelmingly lawful uses."⁵⁶ Alternatively, in the challenge to Florida's new statute, vagueness was found to be the only meritorious argument.⁵⁷

These same contentions can arguably be applied to section 893.145 of Florida's new statute.⁵⁸ However,⁵⁹ in *Record Revolution, No. 6* and *World Imports*,⁶⁰ the specific definition of drug paraphernalia accompanied by the pivotal *mens rea* requirement save the law from vagueness and overbreadth.

Defendants argued in *Florida Businessmen for Free Enterprise v. State*⁶¹ that the three tests of intent in the definition of drug paraphernalia, "used, intended for use, or designed for use,"⁶² established the intent requirement for the entire statute.⁶³ Both sides of the controversy agreed that a statute requiring proof of use, intent to use, or knowledge that an item would be illegally used would meet the standard necessary to uphold the law as constitutional.⁶⁴ The court there did not find the definition of drug paraphernalia as dispositive in establishing the intent

53. *Id.*, slip op. at 12-14.

54. *Id.*

55. 474 F. Supp. 1297 (D.N.J. 1979).

56. *Id.* at 1305.

57. No. TA 80-0954, slip op. at 5 (N.D. Fla. Sept. 30, 1980).

58. FLA. STAT. § 893.145 (Supp. 1980).

59. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

60. No. 80-1414 (D.N.J. June 8, 1980).

61. No. TA 80-0954 (N.D. Fla. Sept. 30, 1980).

62. FLA. STAT. § 893.145 (Supp. 1980).

63. No. TA 80-0954, slip op. at 6 (N.D. Fla. Sept. 30, 1980).

64. *Id.*, slip op. at 6.

requirement for the possession offense.⁶⁵ "Nothing in the definition can be fairly said to link the use, intent, or design to the person charged with a paraphernalia crime."⁶⁶ Consequently, the possession offense was found to be an unconstitutionally defined crime and was struck down.⁶⁷

An examination of the definition itself may show some weakness in its language. The "used" test is clear, e.g. if an individual actually uses an item with a controlled substance, then that item is drug paraphernalia.⁶⁸ However, even here intent cannot be bootstrapped from mere possession. There must be sufficient circumstantial evidence to support this presumption,⁶⁹ such as statements and attendant circumstances. Failure to include the intent element in the possession offense renders moot this "used" test in Florida's new statute.

The other two intent tests do not share the clarity of the "used" test. "Intended for use"⁷⁰ is susceptible of several interpretations. Is this the intent of the purchaser, retailer, or manufacturer? If it is the former, then there is undue burden on both the retailer and the manufacturer to determine the subjective intent of the purchaser.⁷¹ In addition, they face prosecution for the use of an item far beyond their control.

Problems of transferred intent may also arise if the "intended for use"⁷² element is considered that of the seller. Either purchaser or manufacturer could be prosecuted on the basis of the seller's intent. Finally, if the intent is considered to be that of the manufacturer, both purchasers and retailers may be subject to prosecution even though they may lack any criminal intent. These problems were recognized in a recent challenge to an MDPA-based city ordinance, *Florida Businessmen for Free Enterprise v. City of Hollywood*,⁷³ where the court

65. *Id.*

66. *Id.*, slip op. at 8.

67. *Id.*, slip op. at 9, 12.

68. FLA. STAT. § 893.145 (Supp. 1980).

69. *Screws v. United States*, 325 U.S. 91, 107 (1945).

70. FLA. STAT. § 893.145 (Supp. 1980).

71. *Knoedler v. Roxbury Township*, 485 F. Supp. 990, 993 (D.N.J. 1980).

72. FLA. STAT. § 893.145 (Supp. 1980).

73. No. 80-6157 Civ-NCR (S.D. Fla. Aug. 29, 1980).

found that these interpretations would not survive judicial scrutiny.⁷⁴ Rather, the court supported the DEA'S view of intent that each defendant "must have general criminal intent with respect to the offenses alleged."⁷⁵

The court in *Indiana Chapter of NORML, Inc. v. Sendak*⁷⁶ also found the last intent test, "designed for use,"⁷⁷ insufficiently clear. In contrast, the *Record Revolution*⁷⁸ court dismissed concerns over the latter two tests of intent by construing the definition of drug paraphernalia in terms of the intent of the individual or entity charged with violation of the law.⁷⁹ The court noted that a blanket prohibition of every item used with drugs would be imprecise and lead to selective enforcement.⁸⁰ By defining drug paraphernalia in terms of the intent of the individual or entity in control, MDPA-based laws have purportedly avoided this problem. The law supposedly would not affect first amendment rights or innocently held property of individuals who lack guilty intent.⁸¹

For an item to be classified as drug paraphernalia, one of the three types of intent must be present.⁸² Without proof of the requisite intent, there can be no conviction for the sale or manufacture of drug paraphernalia because the item in question would not be drug paraphernalia.

The Drug Enforcement Administration contends that a statute which "embodies a specific intent to violate the law"⁸³ is not unconstitutionally vague. Alternatively, it can be argued that this statute is not vague only to those who do intend to violate the law. Other innocent individuals without guilty intent are left with only their own subjective understanding of what the law requires. Further, the intent standard

74. *Id.*, slip op. at 7.

75. *Id.*

76. No. TH 75-142-C (S.D. Ind. Feb. 4, 1980).

77. FLA. STAT. § 893.145 (Supp. 1980).

78. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

79. *Id.* at 9.

80. *Id.* at 8, citing *United States v. Brunnet*, 53 F.2d 219 (W.D. Mo. 1931).

81. MDPA, *supra* note 2, at 9, 12.

82. *Id.* at 6.

83. *Id.* at 7, citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); 325 U.S. 91, 101.

seems to be contradicted by the latter portion of section 893.146(5),⁸⁴ which gives one of the factors to be used in determination of drug paraphernalia: "The innocence of an owner, or of anyone in control of the object, as to a direct violation of the act shall not prevent a finding that the object is intended for use, or designed to use, as drug paraphernalia."⁸⁵ If the owner or one in control of an object is innocent, e.g., does not have the guilty intent or knowledge, then the item is not drug paraphernalia under a "used for, intended for use, or designed for use"⁸⁶ standard.

An additional problem exists with the necessary element of intent. It can only be proven at the trial level. Prior to that, law enforcement is free to selectively enforce the law, possibly rendering Florida's statute violative of the equal protection clause of the fourteenth amendment. In fact, the new statute may have been designed for this purpose. A Florida Senate Staff analysis and economic impact statement indicates that the intent of the legislature was to affect the retail sales of "head shops."⁸⁷ As in *Record Museum v. Lawrence Township*,⁸⁸ the law cannot be lawfully applied only to head shops. Advocates of Florida's new law argue that it does apply to all individuals, as did the court in *Record Revolution*.⁸⁹ Nonetheless, factors to be used in the determination of what is drug paraphernalia suggest otherwise. Specifically, section 893.146(10) states: "Whether the owner, or anyone in control of the object is a *legitimate* [emphasis added] supplier of like or related items to the community, such as a licensed distributor or dealer or tobacco products."⁹⁰ This section seems to indicate that a licensed distributor or dealer of tobacco products can sell items that might otherwise be deemed drug paraphernalia while a retailer not in this category may not. The court in *Record Revolution* found the undefined term "legitimate" to also fail the test of vagueness by creating a danger of arbi-

84. FLA. STAT. § 893.146(5).

85. FLA. STAT. § 893.146(5) (Supp. 1980).

86. FLA. STAT. § 893.145 (Supp. 1980).

87. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, Apr. 17, 1980 (Bill No. and Sponsor: S.B. 291, Senator Poole).

88. 481 F. Supp. 768 (D.N.J. 1979).

89. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

90. FLA. STAT. § 893.146(10) (Supp. 1980).

trary and discriminatory enforcement.⁹¹ On the other hand, the court in *Florida Businessmen for Free Enterprise v. City of Hollywood*⁹² found no vagueness either in the indicia of what may be considered drug paraphernalia, or on the issue of legitimacy.⁹³

The "reasonably should have known" phraseology⁹⁴ in Florida's new statute at section 893.147(2)⁹⁵ and section 903.147(4)⁹⁶ has also been an issue in other cases challenging MDPA-based laws. The court in *Record Revolution*⁹⁷ found that the element of actual knowledge would protect the due process rights of criminal defendants, while the constructive knowledge standard would not.⁹⁸ The *Record Revolution* court cited *Knoedler v. Roxbury's*⁹⁹ discussion of the problems:

[T]he seller faced with the Roxbury Ordinance has to . . . determine what the customer intends to do with the items of purchase. Certainly in a case where the purchaser announces his or her intention to utilize the paraphernalia purchased for an illegal purpose, the seller would be placed in no dilemma; however, the question arises as to what would create a reasonable belief in the mind of the seller in the absence of such an unlikely announcement by the purchaser. Does the purchaser's age, sex, mannerism or dress afford to a seller reason to believe that the paraphernalia will be used for an illegal purpose. Or should the nature of the purchaser's companions or the items he or she carries be determinative? These questions indicate the difficulty that a merchant, as well as a law enforcement officer, would have, in the absence of an admission by the purchaser, in determining what gives rise to a reasonable belief that a purchaser intends to utilize the paraphernalia for an illegal purpose. An additional concern is whether it is proper to charge an owner of a department store, or any other store, with responsibility for a sales clerk's determination as to whether the person purchasing an item, especially an innocuous one such as a weight scale or a spoon, in-

91. No. C-80-38, slip op. at 12 (N.D. Ohio April 14, 1980).

92. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

93. *Id.* at 6.

94. FLA. STAT. §§ 893.147(2), 893.147(4) (Supp. 1980).

95. FLA. STAT. § 893.147(2) (Supp. 1980).

96. FLA. STAT. § 893.147(4) (Supp. 1980).

97. No. C-80-38 (N.D. Ohio April 14, 1980).

98. *Id.*, slip op. at 15.

99. 485 F. Supp. 990.

tends to utilize it for some improper and illegal purpose.¹⁰⁰

In light of this discussion, the court in *Record Revolution* noted that "defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual's ability to perceive"¹⁰¹ provided insufficient guidelines to both sellers and law enforcement officials. *World Imports Inc. v. Woodbridge Township*,¹⁰² and *Florida Businessmen For Free Enterprise v. City of Hollywood*¹⁰³ stand in opposition to this reasoning,¹⁰⁴ holding that the "reasonably should have known"¹⁰⁵ standard does not significantly differ from the actual knowledge standard.¹⁰⁶ In their view, there would be no difference between the two standards in practical application.¹⁰⁷

In addition to the possibility of selective enforcement against retailers, there is an issue which current cases have not discussed, e.g., the strong probability of selective enforcement against individuals. Current jewelry fashions include small spoon or razor blade necklaces which law enforcement may consider drug paraphernalia, and for which an individual could be arrested regardless of his or her intent. The same is true of possession of ornamental water pipes, bowls, sifters, alligator clips, scales, mirrors with "cocaine" imprinted on them, and a myriad of other objects. Display of these items may be considered symbolic speech since that action may be a non-verbal expression of support for reform of drug laws or as a protest to current drug laws. "Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."¹⁰⁸ With the threat of arrest, individuals may avoid conduct which is privileged under the first amendment.

100. No. C-80-38, slip op. at 15 (N.D. Ohio Apr. 14, 1980).

101. *Id.*, slip op. at 15.

102. No. 80-1414 (D.N.J. June 8, 1980).

103. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

104. No. TA80-0954 (N.D. Fla. Sept. 30, 1980).

105. FLA. STAT. § 893.14 (Supp. 1980).

106. No. 80-1414, slip op. at 6; No. 80-6157-Civ-NCR, slip op. at 6.

107. No. 80-6157-Civ-NCR, slip op. at 6.

108. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1971) (footnotes omitted).

Prohibitions on advertisement of drug paraphernalia, such as section 893.147(4),¹⁰⁹ have also been challenged on grounds of vagueness, overbreadth and undue interference with first amendment protected commercial speech. In *Record Museum v. Lawrence Township*,¹¹⁰ declaratory and injunctive relief was granted on these grounds. The court noted that even speech which has only a commercial purpose warrants first amendment protection.¹¹¹ Further, seeking out speech of particular content and preventing its dissemination completely, exceeds legitimate restrictions on commercial speech.¹¹² These arguments were dismissed in *Record Revolution*¹¹³ and in *Florida Businessmen for Free Enterprise v. State*¹¹⁴ when the court held that if the speech solicited illegal activity it was not protected.¹¹⁵ However, some courts set standards for a first amendment exception higher than these courts. For an exception to apply, the speech must be directed to "inciting or producing imminent lawless action and likely to incite or produce such action."¹¹⁶ Arguably, the purpose of advertisements for items that may be used as drug paraphernalia is not to advocate illegal acts, but rather to present availability of goods for sale. Alternatively, if instructions or statements are included as to the use of controlled substances or encouraging their use, this would fall under the exception to protected speech. Advertisements of availability of goods do not, unless it can be shown that the advertiser actually possessed the guilty knowledge or intent required. Nor could advertisements from other states be prohibited. Interstate dissemination of information by the citizen of a state in which an activity is legal may not be barred under the guise of state police power.¹¹⁷ Contrary to these arguments, the court in *Florida Businessmen for*

109. FLA. STAT. § 893.147(4) (Supp. 1980).

110. 481 F. Supp. 768.

111. *Id.* at 774.

112. *Virginia Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976).

113. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

114. No. TA 80-0954 (N.D. Fla. Sept. 30, 1980).

115. *Id.*, slip op. at 11; No. C-80-38, slip op. at 21 (N.D. Ohio April 14, 1980).

116. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1040 (1978), citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

117. 456 F. Supp. at 1041 (1978), citing *Bigelow v. Virginia*, 421 U.S. 809 (1975).

*Free Enterprise v. City of Hollywood*¹¹⁸ reasoned that the “free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community.”¹¹⁹ The court concluded that the challenged ordinance was valid and that possession, manufacture, and delivery of drug paraphernalia could be proscribed. It then reasoned that “advertising intended to ‘promote the sale of objects designed or intended for use as drug paraphernalia’ [could also] be prohibited.”¹²⁰

The advertising restriction in *High Ol’ Times, Inc. v. Busbee*¹²¹ also failed for lack of either a compelling state interest or a significant state policy to be effected.¹²² Commercial speech cannot be banned on the basis of an unsubstantiated belief that its impact is detrimental.¹²³ Inability to demonstrate that the chosen statutory course would lead to the desired result invalidated the proposed restriction in *High Ol’ Times*.¹²⁴ However, *Florida Businessmen for Free Enterprise v. City of Hollywood*¹²⁵ held that the community’s interest was validly served by preventing proliferation of drug paraphernalia.

In the wake of that decision it is interesting to examine the underlying purpose of drug paraphernalia laws. Such an examination raises a chicken-egg debate: Does possession, sale, and manufacture of items which could be used as drug paraphernalia contribute to drug abuse, or, does drug abuse foster the possession, sale, and manufacture of drug paraphernalia? To mix metaphors, the proverbial horse is out of the barn on the latter question as it appears that the development of the accessories industry is a recent phenomenon growing out of the popularity of recreational drug use. With adoption of the MDPA,¹²⁶ Florida is attempting to close the door to an already empty stall. The new statute will affect the manufacture and sale of some items which may be used as drug paraphernalia, but it will not affect drug abuse. The rate of recreational drug use combined with the easy availability of common

118. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

119. *Id.*, slip op. at 9.

120. *Id.*

121. 456 F. Supp. 1035.

122. *Id.* at 1043.

123. *Linmark Assoc., Inc., v. Willingboro*, 431 U.S. 85, 95-96 (1977).

124. 456 F. Supp. at 1043.

125. No. 80-6157-Civ-NCR (S.D. Fla. Aug. 29, 1980).

126. MDPA, *supra* note 2.

substitutes for paraphernalia assures this.

The final grounds of challenge to MDPA-based laws has been unconstitutional infringement on the commerce clause by impermissible burden on interstate commerce.¹²⁷ Using the three part test of *Pike v. Bruce Church, Inc.*,¹²⁸ the court in *Record Revolution*¹²⁹ found the ordinance served a legitimate concern, the intent elements limited the scope of the ordinance, and the impact on interstate commerce was thus minimized.¹³⁰ In contrast, the court in *Bambu*¹³¹ ruled that the plaintiff's constitutional rights included the right to own and deal in property, e.g., cigarette papers, and to engage in interstate commerce of them. Infringement of those rights caused the ordinance to be overbroad and unenforceable as to the manufacturer and distributors.¹³² Section 893.147(2) could arguably fall on either of these opposite sides.

Conclusion

Due to problems of vagueness and overbreadth, the section 893.145(1) standard of "intended for use, or designed for use" should be deleted from Florida's new drug paraphernalia statute. For the same reasons so should section 893.146(5) and section 893.146(1) and the "reasonably should know" standard of section 893.147(2) and section 893.147(4). In adopting a modified version of the MDPA, Florida may only have succeeded in making the symptoms of drug abuse illegal without addressing the problem of drug abuse itself. The legitimate purpose of protecting children from undue influence and encouragement to abuse drugs may be better served by more effective drug abuse education and prevention programs, demonstration of family and societal attitudes discouraging drug abuse, and laws prohibiting sale and distribution to minors of items most commonly used as drug paraphernalia. It is not necessary to go to the lengths of Florida's new statute to achieve this result.

Faye Jones

127. No. C-80-38, slip op. at 25 (N.D. Ohio Apr. 14, 1980).

128. 397 U.S. 137, 142 (1970).

129. No. C-80-38 (N.D. Ohio Apr. 14, 1980).

130. *Id.*, slip op. at 26.

131. 474 F. Supp. 1297.

132. *Id.* at 1305-06.

1980 Florida Legislature—Denial of Bail to Drug Felons: Florida Statute 903.133.

On June 6, 1980, Governor Graham signed House Bill 1749,¹ creating Florida Statute §903.133,² which prohibits bail on appeal to any person found guilty of a first degree felony drug offense.³

The enactment of this law raises several questions which require examination: (1) is there a constitutional right to bail subsequent to conviction?; (2) has the legislature, in creating a law denying such bail, infringed upon the powers of the judiciary?; (3) is such a law tantamount to harsh, cruel, and unusual punishment?; and (4) are persons affected by the law deprived of equal protection and due process of law?

The Legislature had three primary reasons for adopting this law: (1) first degree felony drug offenses have had a severely adverse affect on the citizenry of the state; (2) persons who commit these offenses use the proceeds obtained therefrom to further the existence of the drug trade in the state; and (3) a person adjudged guilty of such an offense has committed a serious crime and, consequently, is likely to flee justice

1. This bill passed the House by a vote of 103-3 and the Senate by a vote of 27-1.

2. Section 903.133 provides:

Bail on appeal; absolute prohibition: first degree felony adjudication under the Florida Comprehensive Drug Abuse Prevention and Control Act. —Notwithstanding the provision of s. 903.132, no person adjudged guilty of a first degree felony for a violation of s. 893.13 or s. 893.135 shall be admitted to bail pending appellate review.

3. A first degree felony under section 893.13, Florida Statutes, is the sale, delivery, or possession of more than 10 grams of certain Schedule I drugs or the delivery by a person over 18 to a person under 18 of certain Schedule I and II drugs. Fla. Stat. § 893.13 (1979).

A first degree felony under section 893.135, Florida Statutes, is the sale, manufacture, delivery or possession of: "(1)(a) . . . an excess of 100 pounds of cannabis. . . , (b)(1) . . . 28 grams or more of cocaine or of any other mixture containing cocaine. . . , [or] (c) . . . 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin. . . ." FLA. STAT. § 893.13 (1979).

and disappear upon conviction.⁴ The Legislature determined that "the mere forfeiture of bond on appeal does not serve the ends of justice."⁵

(1) *CONSTITUTIONAL PROTECTIONS*

Although there is a Florida constitutional provision that all persons "shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great,"⁶ this provision has long been held to have no application to a defendant's right to bail after conviction.⁷ The reasoning used by the courts in reaching this conclusion is clearly expressed in the United States Supreme Court decision of *Stack v. Boyle*.⁸ There, the Court ruled that once a defendant has been found guilty, the reasons for granting bail, such as the opportunity thereby afforded the defendant to actively participate in the preparation of his defense and the postponement of imprisonment until conviction, are no longer applicable.⁹

Therefore, it was early settled in Florida¹⁰ that "admission to bail, after conviction, is not a matter of right but rests in the sound judicial discretion of the trial court."¹¹ The state supreme court established a fair and reasonable standard to be applied by trial courts in making their decisions on this issue.¹² If an appeal is taken merely for delay, bail should be refused; but if the appeal is taken in good faith, on fairly arguable and non-frivolous grounds, bail should be granted.¹³ Recognizing that the purpose of bail is to insure the attendance of the defendant to answer the charge against him, it was decided that if there are situations that indicate the accused will flee and thus elude punishment if his conviction is affirmed, the trial judge may correctly use his discre-

4. Chapter 80-72, 1980 Fla. Sess. Law Serv. 284 (West).

5. *Id.*

6. FLA. CONST. art. I, § 14 (1968), amending prior § 9.

7. *De Conongh v. City of Daytona Beach*, 103 So. 2d 233, 236 (Fla. Dist. Ct. App. 1958); *Greene v. State*, 238 So. 2d 296, 298 (Fla. 1970).

8. 342 U.S. 1 (1954).

9. *Id.* at 4.

10. *See Younghans v. State*, 90 So. 308 (Fla. 1956).

11. *Id.* at 309.

12. *Id.* at 310.

13. *Id.*

tion against the granting of bail.¹⁴ One such situation is the harshness of the sentence imposed for the crime, this being pertinent to the issue of whether the person would be incited to flee the jurisdiction of the court.¹⁵

In light of the severe penalties incurred upon conviction of a first degree felony,¹⁶ the presumed availability of large sums of money to persons convicted of drug offenses,¹⁷ and the consequent likelihood of their flight to avoid justice,¹⁸ it would seem that a trial judge could deny bail in such a case. However, in some cases, judicial discretion may dictate that the availability of bail is necessary for the ends of justice to be met.

(2) SEPARATION OF POWERS

This raises the question of whether the removal of bail from judicial purview by statutory regulation is a proper function of the state Legislature. In *Greene v. State*,¹⁹ the Supreme Court of Florida had to determine whether a statute denying bail upon appeal from a convic-

14. *Id.*

15. *Sims & Wainwright*, 307 F. Supp. 116 (S.D. Fla. 1969).

16. FLA. STAT. § 775.082 (1979) provides:

Penalties. -

....

(3) A person who has been convicted of any other designated felony may be punished as follows:

....

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years, or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment. . . .

FLA. STAT. § 775.083 (1979) provides:

Fines. -

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in section 775.082. . . . Fines for designated crimes and for noncriminal violations shall not exceed:

....

(b) \$10,000, when the conviction is of a felony of the first or second degree.

17. *See* note 4 *supra*.

18. *Id.*

19. 238 So. 2d 296 (Fla. 1970).

tion of a felony, to persons previously convicted of a felony,²⁰ represented a legislative encroachment upon the powers of the judiciary.²¹ Analogizing this question to the wide discretion trial courts historically exercised in deciding the severity of punishment given to the convicted offender, it was pointed out that the boundaries of this discretion were changed whenever the Legislature increased or decreased the minimum or maximum punishment allowable for a particular crime.²² In addition, the court stated that the Legislature long ago superseded judicial discretion when it fixed compulsory life imprisonment or death sentences for rape and first degree murder²³ and said that the Legislature has gone no further in enacting the statute under attack in this case.²⁴ The court held that the statute did not encounter the infirmity of encroaching upon the separation of powers doctrine.²⁵

The federal courts' stance was also discussed by the state supreme court in *Greene*. The court stated that generally the federal courts have agreed that there is no absolute constitutional right to bail after conviction guaranteed by the eighth amendment to the United States Constitution.²⁶ The court went on to say:

20. Fla. Stat. § 903.132 (1979) provides:

Bail on appeal; conditions for granting; appellate review. -

(1) No person may be admitted to bail upon appeal from a conviction of a felony unless the defendant establishes that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous. However, in no case shall bail be granted if such person has previously been convicted of a felony, the commission of which occurred prior to the commission of the subsequent felony and such person's civil rights have not been restored or if other felony charges are pending against him and probable cause has been found that the person has committed the felony or felonies at the time the request for bail is made.

21. 238 So. 2d at 299.

22. *Id.*

23. FLA. STAT. § 794.01 (1969) provided: "imprisonment in the state prison for life, or for any term of years within the discretion of the judge" for rape.

FLA. STAT. § 782.04 (1969) provided the death penalty for murder in the first degree (i.e., premeditated murder or murder "committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping . . .").

24. 238 So. 2d at 299.

25. *Id.*

26. *Id.*

Even those federal courts that have expressly held or assumed, *arguendo*, that the bail provision of the eighth amendment to the United States Constitution applies directly to state action, have recognized that a state may constitutionally by statute or exercise of judicial discretion grant release on bail in some cases and deny it in others, as long as the state acts reasonably and not arbitrarily or discriminatorily.²⁷

This presents the question of whether the Legislature acted in a reasonable and non-arbitrary manner in creating section 903.133. It would seem the Legislature did act in such a manner since the Legislature's motive, the prevention of flight by an accused free on bail subsequent to a conviction,²⁸ was accepted earlier by the state supreme court in *Greene*. There, the court held that the statutory denial of bail after conviction pending appeal, because of the likelihood that the accused would be a poor bail risk, could not be said to be an arbitrary or unreasonable action on the part of the state.²⁹

(3) CRUEL AND UNUSUAL PUNISHMENT

Could the constitutionality of section 903.133 be successfully challenged on the ground that denial of bail is tantamount to harsh, cruel, and unusual punishment? This constitutional claim was examined in the Louisiana case of *State v. James*.³⁰ James was convicted of unlawful possession of a narcotic drug (one morphine tablet). According to a Louisiana statute,³¹ bail pending appeal was denied to offenders who had received a sentence of five years or more in a felony case. Under another statute,³² the minimum sentence for the illegal possession of narcotics was five years. Therefore, the defendant was denied bail pending appeal. The Supreme Court of Louisiana held that the denial of bail pending appeal to a narcotic offender based upon the length of his sentence did not constitute cruel or unusual punishment. Consequently, the defendant's attack upon the constitutionality of the state's

27. *Id.*

28. See note 4 *supra*.

29. 238 So. 2d at 299.

30. 246 La. 1053, 169 So. 2d 89 (1964), *rev'd on other grounds*, 382 U.S. 36 (1965).

31. LA. REV. STAT. ANN. §15:85 (West 1964).

32. LA. REV. STAT. ANN. §40:981 (West 1964).

Uniform Narcotic Act failed.³³ If the reasoning of the Louisiana Supreme Court is followed, a similar attack on section 903.133 would be equally unsuccessful.

(4) *EQUAL PROTECTION AND DUE PROCESS OF LAW*

Could section 903.133 be held unconstitutional on the grounds that it denies a person convicted of a first degree felony equal protection and due process of law as guaranteed by the constitutions of the United States and Florida?³⁴ Such a result would seem unlikely in light of the Supreme Court of Florida's response to this question in *Gallie v. Wainwright*³⁵ and *Kelly v. State*.³⁶ These two cases follow *Greene*³⁷ in supporting section 903.132³⁸ a law similar to section 903.133 in its effect on a specialized group of offenders. The defendants in these cases challenged the constitutionality of section 903.132 on due process and equal protection grounds. Gallie also argued that he had a fundamental right to be heard on the issue of bail risk. The court declared he had no such right since it was well settled that there is no absolute constitutional right to bail pending appeal of any state criminal conviction, whether first or subsequent, misdemeanor or felony.³⁹ Since no fundamental right was affected, and the defendant conceded the state's interest in assuring the attendance of the defendant at the end of the appeal was a compelling interest, it was clear that section 903.132 did not run

33. 169 So. 2d at 92.

34. U.S. CONST., amend XIV, §1 provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

FLA. CONST. art. I, § 2 provides: "[a]ll natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. . . ."

FLA. CONST. art. I, § 9 provides: "[n]o person shall be deprived of life, liberty or property without due process of law. . . ."

35. 362 So. 2d 936 (Fla. 1978).

36. 362 So. 2d 945 (Fla. 1978).

37. 238 So. 2d 296 (Fla. 1970).

38. See note 20 *supra*.

39. 362 So. 2d at 941.

counter to any constitutional ideas of equal protection.⁴⁰

Further authority for the proposition that a statute may specifically enumerate classes of defendants not entitled to bail on appeal may be found in *State v. Flowers*⁴¹ and *Swain v. State*.⁴² In *Flowers*⁴³ the defendant was found guilty of possession with intent to deliver heroin in violation of a state statute.⁴⁴ After trial and pending a pre-sentence investigation he was released on bail.⁴⁵ The state then moved to revoke the bail on the basis of an amendment to the Delaware Constitution⁴⁶ which provided that in the case of an investigation for an offender convicted of such a narcotic violation, the offender would immediately be remanded to the Delaware Correctional Center during the time the investigation was being conducted. The trial court granted the state's motion and the defendant then filed a petition for a writ of habeas corpus, contending his confinement was unlawful because the statute was unconstitutional.⁴⁷ The Delaware Supreme Court held that the statute was constitutional since there was no constitutional right to bail in the period subsequent to conviction but prior to sentencing.⁴⁸ Rather, bail during that interim period was a matter of discretion with the court which the state legislature could limit or eliminate by statute.⁴⁹

Likewise, in *Swain*,⁵⁰ the Tennessee Supreme Court upheld a statute⁵¹ which denied the petitioner bail pending appeal from his conviction for selling a controlled substance (phencyclidine). Here again, it was recognized that the constitutional assurance of bail for criminal defendants prevails only prior to conviction and there is no federal assurance of bail subsequent to conviction.⁵² The court noted that a de-

40. *Id.*

41. 330 A.2d 146 (Del. 1974).

42. 527 S.W.2d 119 (Tenn. 1975), *appeal dismissed*, 423 U.S. 1041 (1975).

43. 330 A.2d at 147.

44. DEL. CODE tit. 16, § 4751 (1978).

45. 330 A.2d at 147.

46. DEL. CODE tit. 11, § 4331(a) (1979).

47. 330 A.2d at 147.

48. *Id.* at 148.

49. *Id.* at 149.

50. 527 S.W.2d 119.

51. TENN. CODE ANN. § 40-3406 (1980).

52. 527 S.W.2d at 120.

fendant convicted of unlawful possession of heroin under a New York criminal procedure law could not be admitted to bail.⁵³

CONCLUSION

In *United States v. Miranda*,⁵⁴ the District Court for the Southern District of Florida pointed out the need for a law such as section 903.133 of the Florida Statutes. The court noted that "substantial drug trafficking is itself a sufficient danger to the community to justify denying bond pending appeal to a defendant found guilty of being a dealer in drugs."⁵⁵ And "if any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. Questions as to wisdom, need or appropriateness are for the legislature."⁵⁶

Since there is no constitutional right to bail subsequent to a conviction, and bail at that time is a matter of judicial discretion which the state may limit or eliminate by statute as long as it acts reasonably, it appears that section 903.133, Florida Statutes, should be able to withstand any constitutional challenge.

James P. McLane

53. *Id.* at 121.

54. 442 F. Supp. 786 (S.D. Fla. 1977).

55. *Id.* at 792.

56. *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977).

Attorney's Fees: Florida Statute 57.105

In the United States "absent statute or enforceable contract, litigants pay their own attorney's fees."¹ Thus, the "American rule" is that attorney's fees are not ordinarily among the costs a winning party may recover.²

The Florida Legislature became disenchanted with the results effectuated by this rule in the Florida judicial system, and perhaps unknowingly it leaned toward the system favored by the English. Their courts are authorized to award attorney's fees to successful plaintiffs in litigation and "to defendants in all actions where such awards might be made to plaintiffs."³ The adoption of the English system in the United States, however, could have a chilling effect on parties who think they have a genuine controversy, at law or in fact, in need of resolution but who do not want, or cannot afford, the additional expense of paying their adversary's attorney's fees in the event of a loss.

Florida courts have held in some cases that "irrespective of statute, contract, stipulation, or fund, in *exceptional circumstances*, where justified by inequitable conduct, attorney's fees may be assessed as costs against the losing party."⁴ Although a statute to that effect did not exist, the Florida Legislature periodically had enacted statutes awarding reasonable attorney's fees under certain circumstances, such as in actions for unpaid wages,⁵ divorces,⁶ and mechanics liens,⁷ among

1. *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

2. *Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836, 4838 (June 23, 1980). The Supreme Court held 28 U.S.C. § 1927 (1966), which provides that counsel "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such costs," was not intended to include attorneys fees as costs. The Court upheld the "American rule," that each party pays his own attorney's fees, but upheld the assessing of attorney's fees as costs—in federal court—against counsel who has willfully abused the judicial processes and/or against a party who has instituted and/or litigated a lawsuit in bad faith.

3. 1 S. SPEISER, *ATTORNEYS FEES* 479 (1973).

4. Wahl, *Attorney's Fees Taxed Against Opposing Party*, 37 FLA. B.J. 220 (1963) (emphasis supplied) (citing unreported Florida cases).

5. FLA. STAT. § 448.08 (1979).

others. It is evident that the Legislature was biting off pieces of the American rule a little at a time from the body of Florida common law.

I. Legislative History and Intent: Florida Statute § 57.105

In 1978,⁸ the Legislature enacted section 57.105 of the Florida Statutes, in derogation of the common law.⁹ Only applicable to civil litigation,¹⁰ the statute in its entirety reads: 57.105 Attorney's fee

The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.¹¹

This section of the Florida Statutes has a short but interesting legislative history. In the House of Representatives it carried the nomenclature House Bill 1062.¹² Representative Barry Richard (District 112, Democrat, Miami), the bill's sponsor,¹³ read it for the first time by title and referred it to the Committee on Judiciary on April 5, 1978.¹⁴ The pertinent portion of the bill read as follows:

An act relating to civil litigation . . . providing that the court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there *are no genuine issues of law or*

6. FLA. STAT. § 61.16 (1979).

7. FLA. STAT. § 713.29 (1979).

8. FLA. STAT. § 57.105 (1979).

9. *Rivera v. Deauville Hotel, Employees Serv. Corp.*, 277 So. 2d 265 (Fla. 1973); *Stone v. Jeffres*, 208 So. 2d 827 (Fla. 1968).

10. *State v. LoChiatto*, 381 So. 2d 245, 246 (Fla. 4th Dist. Ct. App. 1980). The court held section 57.105 does not authorize an assessment of attorney's fees "for appellate proceedings in a criminal case for the reason that the statute pertains to appellate proceedings in civil cases."

11. FLA. STAT. § 57.105 (1979).

12. JOURNALS OF THE FLORIDA HOUSE OF REPRESENTATIVES, SPECIAL SESSION 1977-78, REGULAR SESSION 1978 at 112 [hereinafter JOURNAL-FLA. HOUSE].

13. JUDICIARY COMMITTEE STAFF REPORT, BILL NO. 1062 (Fla. House of Representatives, 1978); JUDICIARY-CIVIL COMMITTEE, SENATE STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, (Bill No. and Sponsor: H.B. 1062, Representative Richard).

14. JOURNAL-FLA. HOUSE at 112.

*material fact in dispute; providing an effective date.*¹⁵

The underscored language is quite similar to the language found in the Florida Rules of Civil Procedure designating the test for summary judgment.¹⁶ This similarity was intentional, because, at one time, Representative Richard had expected a blanket application of the bill to prevailing parties in summary judgment proceedings.¹⁷

The House Judiciary Committee debated the bill on April 20, 1978, with Representative Richard providing the majority of input.¹⁸ Richard referred to the bill as a vehicle "to close a major loophole in

15. *Id.*

16. Fla. R. Civ. P. 1.510(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and administrations on file together with the affidavits, if any, to show that there is no genuine issue as to any material fact and that the moving party is entitled judgment as a matter of law.

This subsection to this rule was amended in 1976, "to require a movant to state with particularity the grounds and legal authority which he will rely upon in seeking summary judgment. This amendment will eliminate surprise. . . ." FLA. R. CT., Committee Note at 38 (1980).

New rule 1.510(c) reads:

The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for hearing. The adverse party may serve opposing affidavits prior to the day of hearing . . . [the body of previously quoted rule 1.510(c), prior to amendment, appears here in full and unchanged]. A summary judgment, interlocutory in character may be rendered on the issue of liability alone. . . .

FLA. R. CT., at 37.

It is curious to note the proximity in time between the addition of section 57.105 to the Florida Statutes and the amendment to rule 1.510(c) of the Florida Rules of Civil Procedure. As will be indicated, the legislature's concern about victims of "frivolously" filed lawsuits or defenses led to the development of section 57.105. The amendment to rule 1.510(c) was designed to avoid surprise to a motion for summary judgment. Both measures appear to be attempts to produce more just results in their respective spheres.

17. *Proposed Statute on Attorney's Fees: Taped Debates on H.B. 1062* (May 4, 5 & 8, 1978) [hereinafter cited as H.B. 1062-taped debates]. The Judiciary Committee designed the bill to read the same as the previous year's bill, which died on the calendar.

18. *Proposed Statute on Attorney's Fees: Hearing on H.B. 1062 Before the House Judiciary Committee* (April 20, 1978) (taped hearing).

terms of the ability of the injured person to get compensation; that is, the inability of injured persons to get attorney's fees."¹⁹ He referred to it as a means by which a person against whom a frivolous suit had been filed, or defense raised, could be recompensed.

On April 21, 1978, the Committee on Judiciary recommended the bill pass.²⁰ It was set on the April 26th calendar,²¹ but it was not debated in the House until May 4th, 5th, and 8th, 1978.²² The tape recorded debates²³ of the bill contain more information regarding legislative intent than any available written material.²⁴ However, the best method of determining legislative intent is a juxtaposition of the House and Senate Journals with the taped debates.

The May 4th debates commenced with Representative Richard's comments regarding the purpose of the bill: "The court in which there is a frivolous lawsuit filed, a frivolous defense raised, it [sic] shall provide attorney's fees to the prevailing party."²⁵

Representative Charles C. Pappy, Jr. (District 117, Democrat, Miami), concerned with the apparent misnomer of the proposed legislation, stated his views: "Mr. Richard, if you want to give attorney's fees in frivolous suits, why don't you say so in your bill?"²⁶ Pappy further remarked, "there are many cases filed in which a side loses that should not have to pay attorney's fees;" and to avoid having the bill misconstrued the word frivolous should be used because "we all know what that means."²⁷

19. *Id.*

20. JOURNAL-FLA. HOUSE at 314.

21. *Id.* at 332.

22. *Id.* at 417, 428, 434; H.B. 1062-taped debates.

23. H.B. 1062-taped debates.

24. JOURNAL-FLA. HOUSE at 112, 314, 332, 417, 428, 434, 453, 665, 827, 1196; FLA. JOURNAL OF THE SENATE, SPECIAL SESSION 1977-78, REGULAR SESSION 1978 at 357, 453, 456, 564, 575 [hereinafter cited as JOURNAL-FLA. SENATE]; 1978 Fla. Laws, ch. 78-275; JUDICIARY COMMITTEE STAFF REPORT, Bill No. 1062 (Fla. House of Representatives, 1978); JUDICIARY-CIVIL COMMITTEE SENATE STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, (Bill No. H.B. 1062); FLA. STAT. § 57.105 (1979). None of the written documents refer to H.B. 1062 or section 57.105 as having anything to do with "frivolous" lawsuits.

25. H.B. 1062-taped debates.

26. *Id.*

27. *Id.*

After Representative Richard explained the terminology of the bill,²⁸ he stated his desire to have the bill made applicable to all summary judgments. Representative William C. Andrews (District 27, Democrat, Gainesville) presented an amendment to strike the enacting clause to keep the bill alive on the House floor for debate.²⁹ Andrews' concern was that if a suit were instituted in good faith to test the "validity or constitutionality of a statute," and the facts were not disputed, the passage of the bill inappropriately would mandate the assessing of attorney's fees against the losing party.³⁰ There was further debate regarding the chilling effect the bill's passage would have on the basic constitutional right of accessibility to the courts³¹ balanced against the need to provide relief to victims of frivolously filed lawsuits or defenses³² and constituents' demands to have that need fulfilled.³³

On May 5th, Representative Andrews' first amendment was withdrawn and a second substituted.³⁴ The second amendment provided for the striking of "are no genuine issues of law or material fact in dispute" and, in its stead, the insertion of "was a complete absence of a justiciable issue of either law or fact."³⁵ This phrase was to eliminate the requirement that attorney's fees be awarded to prevailing parties in all summary judgments. However, this clause was found by Representative Richard H. Langley (District 35, Republican, Clermont) to be inadequate in that only the defendant would be awarded attorney's fees because the proposed language implied the plaintiff should never have

28. *Id.* Statement of Representative Richard.

It was precisely for the reason you suggest, Mr. Papy, that the Judiciary Committee last year changed the bill which did start with the word frivolous. They did it because the word frivolous is not defined in the law; because they were concerned that the judges would apply it inconsistently in one case or another; and, because the terminology which is used here is a term of art which is well established in the law. This way we'd have a more consistent standard.

29. *Id.*

30. *Id.*

31. *Id.* Representative T.M. Woodruff (District 60, Republican, St. Petersburg).

32. *Id.* Representative Richard.

33. *Id.* Representative Dorothy Eaton Sample (District 61, Republican, St. Petersburg).

34. JOURNAL-FLA. HOUSE at 428.

35. *Id.*

filed the lawsuit.³⁶ The addition of the words “raised by the losing party” after the word “fact,” proposed by Representative William E. Sadowski (District 113, Democrat, Miami) in his amendment, was an attempt to resolve the discrepancy.³⁷

Prior to the voting on May 8th,³⁸ three pertinent questions arose. The first mistakenly questioned the propriety of the legislature’s assisting attorneys in the collection of their fees.³⁹ The second referred to default judgments, which would require the assessing of attorney’s fees against the defaulting party, but which would not preclude the judgment from being vacated.⁴⁰ The third dealt with the court’s dismissal of frivolous lawsuits which would also require the assessment of attorney’s fees against the loser.⁴¹ Nevertheless, the bill passed as amended on a

36. H.B. 1062-taped debates.

37. JOURNAL-FLA. HOUSE at 428.

38. *Id.* at 434.

39. H.B. 1062-taped debates.

Representative William R. Conway (District 29, Democrat, Ormond Beach) questioned: “Why does the legislature have a right or a responsibility to guarantee attorneys that they’ll be able to collect their fees when they don’t do that for anyone else?”

Representative Richard replied:

Mr. Conway, that’s not what the bill really does at all. . . . The attorneys are going to get their fees one way or the other. The only question that this bill addresses is who’s to pay them. . . . There’s a familiar maxim in the law that says that for every wrong there’s a remedy. The only difficulty with that maxim is that there is one wrong for which there is no remedy, and that is when a person sues you for no reason whatsoever. If I walk up to you in the street and I punch you in the face and if it costs you \$1000 for dental care to correct the damage, you can sue me for that \$1000. But if I file a lawsuit against you—which anyone of us in this room and any person in the State of Florida can do, anybody can file a lawsuit against any other person—and I have absolutely no basis whatsoever for it, and it costs you \$5000 to hire a lawyer to defend yourself, and you win, you have no basis whatsoever in the law today to get that money back from me and the judge can’t entitle you to get it back from me. So, what this bill says is that if I sue you without justification, that you can get the attorney fees you have to pay your lawyer back from me, because I never should have sued you in the first place.

40. H.B. 1062-taped debates.

41. *Id.*

Representative R. Ed. Blackburn, Jr. (District 64, Democrat, Temple Terrace): “Is it not true that under your bill if someone brings a frivolous and completely unwarranted suit against me, the court dismisses it, then would not that plaintiff have to pay

sixty-four to forty vote and was certified to the Senate.⁴²

The Senate requested and received a staff analysis of the bill,⁴³ and the Committee on Judiciary-Civil, recommended it pass.⁴⁴ On May 29th, 1978, on a thirty-seven to zero vote, proposed statute section 57.105 passed the Senate and subsequently became law.⁴⁵

II. Case Law Interpreting Florida Statute § 57.105

The first court to deal with section 57.105 was the Circuit Court of Palm Beach County in *Morgan v. Boca Raton Community Hospital, Inc.*⁴⁶ The defendant had been rendered a favorable decision by a medical mediation panel⁴⁷ and sought attorney's fees. The case revolved around "whether a medical mediation proceeding [was] a 'civil action' within the meaning of Florida Statute 57.105."⁴⁸ The court held it was not, after extrapolating pertinent data from cases that focused on the statutory construction of section 768.44 of the Florida Statutes⁴⁹ from which medical mediation panels derived their existence. Although it may bear consideration in the determination of "quasi-judicial" pro-

my defense attorney?"

Representative Richard: "Absolutely, Mr. Blackburn, because I think that's only right. . . ."

42. JOURNAL-FLA. HOUSE at 434.

43. JUDICIARY-CIVIL COMMITTEE, SENATE 'STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, Bill No. H.B. 1062:

A. Economic Impact on the Public:

This bill would have the effect of discouraging much litigation; especially that instituted with the intent of securing a settlement rather than actually securing a judgment on the merits of a cause of action. In many instances cases are settled only to avoid the inconvenience and costs of defending a suit, not because one party is clearly at fault.

B. Economic Impact on State or Local Government:

This bill would result in some savings to the judicial branch, by lessening the number of cases the system must handle.

44. JOURNAL-FLA. SENATE at 453.

45. *Id.* at 475.

46. 49 Fla. Supp. 46 (1979).

47. *See* FLA. STAT. § 768.56 (Supp. 1980).

48. 49 Fla. Supp. at 47.

49. As it was being administered, the medical mediation statute, FLA. STAT. § 768.44 (1979), was declared unconstitutional in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980).

ceedings,⁵⁰ the question in *Morgan* is now moot, due to the recent abolition of medical mediation panels in *Aldana v. Holub*.⁵¹

Soon after the *Morgan* decision, *Southeast Growers, Inc. v. Designed Facilities, Inc.*,⁵² was decided by a Broward County Court Judge. The case was ripe for summary judgment since the issue of fact, whether there had been an oral representation made, was "covered by the Statute of Frauds, Florida Statute § 725.01 (1975)."⁵³ The defendant's attorney counterclaimed for attorney's fees under section 57.105 and the judge elected to treat the counterclaim as an "affirmative defense" rather than as an independent motion. He made a determination that section 57.105 "is not the subject of a separate and independent cause of action."⁵⁴ The section is triggered by a reaction to a frivolous claim or defense. The judge ruled that "where a claim is asserted by plaintiff and defeated as a result of an affirmative defense raised by defendant, attorney's fees cannot be awarded to defendant under § 57.105."⁵⁵

The finding that the award of attorney's fees is an affirmative defense is contrary to the legislative intent.⁵⁶ In order for attorney's fees to be assessed against the losing party the court must make a "finding" of "a complete absence of a justiciable issue of either law or fact raised by the losing party."⁵⁷ The judge distinguished the standards for summary judgment and the requisites for the application of 57.105, and did not make a finding as to the validity of defendant's request for attorney's fees. He avoided the question. Had the judge ruled that an oral representation falling under the Statute of Frauds was a valid issue, and not a frivolous question, he would have arrived at the same result, i.e., the denial of attorney's fees.

Subsequently, the Third District Court of Appeal decided *McBain*

50. 49 Fla. Supp. at 47.

51. 381 So. 2d 231 (Fla. 1980).

52. 49 Fla. Supp. 160 (1979).

53. *Id.* at 162.

54. *Id.*

55. *Id.* at 163.

56. H.B. 1062-taped debates.

57. *City of Miami Beach v. Town of Bay Harbor Islands*, 380 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1980).

v. Bowling.⁵⁸ The court authorized the award of attorney's fees following the finding of a complete absence of a justiciable issue of law or fact even if the suit is voluntarily dismissed. This holding covers a situation implied, but not addressed, during the legislative debates fourteen months earlier.⁵⁹

The *McBain* court referred to *Randle Eastern Ambulance Service, Inc. v. Vasta*⁶⁰ to demonstrate the effect of section 57.105. In writing the *Randle* opinion, Justice England, addressed the central issue that "a plaintiff's volitional dismissal divests a trial court of jurisdiction to entertain a later request to be relieved from the dismissal."⁶¹

In the presence of existing law, a plaintiff is prevented from several filings and dismissals of the same claim⁶² and the defendant can "recoup . . . court costs when a voluntary dismissal has been taken."⁶³ Yet, the *Randle* court recognized that:

There is no recompense . . . for a defendant's inconvenience, his attorney's fees, or the instability to his daily affairs which are caused by a plaintiff's self-aborted lawsuit. Nor is there any recompense for the cost and inconvenience to the general public through the plaintiff's precipitous or improvident use of judicial resources.⁶⁴

This is precisely the view held by the majority of legislators who voted on the bill which became section 57.105 at approximately the same time *Randle* was decided.⁶⁵ It is obvious that not all voluntarily dismissed claims are frivolously filed. However, the defendant now has some recourse to dissuade the occurrence of frivolous claims.

The court in *McBain* looked also to *Gordon v. Warren Heating & Air Conditioning, Inc.*⁶⁶ as support for its decision to award attorney's

58. 374 So. 2d 75 (Fla. 3d Dist. Ct. App. 1979).

59. See note 41 *supra*, where the discussion referred to "court dismissals," but not to voluntary dismissals.

60. 360 So. 2d 68 (Fla. 1978).

61. *Id.* at 68-69.

62. *Id.* at 69, citing FLA. R. Civ. P. 1.420(a)(1) (voluntary dismissals).

63. *Id.*, citing FLA. R. Civ. P. 1.420(d) (costs).

64. *Id.*

65. *Randle* was decided May 18, 1978. The House of Representatives voted May 8, 1978, and the Senate May 29, 1978, on what ultimately became section 57.105.

66. 340 So. 2d 1234 (Fla. 4th Dist. Ct. App. 1976).

fees. The *Gordon* court interpreted Florida Statutes § 713.29,⁶⁷ which deals with the awarding of attorney's fees to the prevailing party in actions enforcing mechanics liens.

Two issues resolved by the *Gordon* court were similar to those presented in *McBain* regarding section 57.105. First, whether a party against whom an action has been dismissed is entitled to attorney's fees. Second, "whether a judgment for those fees and costs must be entered as soon as the original action is dismissed rather than as part of the new action."⁶⁸

The *Gordon* court held that "where a mechanic's lien claim [was] voluntarily or involuntarily dismissed, the party against whom the claim was brought is the "prevailing party," and is entitled to recover attorney's fees and costs . . .⁶⁹ [and the prevailing party] should [be] awarded costs and attorney's fees immediately following dismissal of the first action."⁷⁰ Thus, *McBain* supports the rationales of both *Randle* and *Gordon*.

No other case in Florida has so painstakingly analyzed section 57.105 as *Allen v. Estate of Dutton*.⁷¹ The facts in *Allen* revolve around three wills: 1) a will by the husband, appellant's natural father, 2) a will by the wife, appellant's stepmother, executed on the same day, May 27, 1969, as the husband's will, before the same witnesses, and containing a provision declining to exercise the power to appoint the corpus of the "Ellen C. Dutton Trust", so that, at her death, the corpus would be added to the "Dutton Family Trust;" and 3) a revoking will by the wife-stepmother, executed June 22, 1971, after the husband-father's death, specifically exercising the power to appoint given to her by her husband's will, but not appointing the corpus of the trust to the "Dutton Family Trust," of which appellant was a substantial beneficiary.⁷² The wife-stepmother died on April 15, 1978 and her 1971 will

67. FLA. STAT. § 713.29 (1975).

68. *Id.* at 1235.

69. The court cited *Mardan Kitchen Cabinets, Inc. v. Bruns*, 312 So. 2d 709 (Fla. 3rd Dist. Ct. App. 1975); *Jackson v. Hatch*, 288 So. 2d 564 (Fla. 2d Dist. Ct. App. 1974); and *Lion Oil Co., Inc. v. Tamarac Lakes, Inc.*, 232 So. 2d 20 (Fla. 4th Dist. Ct. App. 1970). See also Annot., 65 A.L.R.3d 1087 (1975).

70. 340 So. 2d at 1235.

71. 384 So. 2d 171 (Fla. 5th Dist. Ct. App. 1980).

72. *Id.* at 172.

was admitted to probate.⁷³ Appellant contested the validity of the 1971 will but the lower court granted appellee's motion for judgment on the pleadings and awarded appellee's attorneys "\$23,000 under the provisions of Section 57.105."⁷⁴

Appellant's contention was "that since the statute [was] silent as to contracts *not to revoke a will*, (emphasis in original) such contracts need not be in writing."⁷⁵ The statute referred to is Florida Statute § 731.051.⁷⁶ "[S]ection 732.701 Florida Statutes (1975) . . . [which provides] that an agreement not to revoke a will must be in writing and signed by the agreeing party in the presence of two attesting witnesses, . . . was not in effect at the time the will in question was executed,"⁷⁷ and was therefore inapplicable.

The court looked to other jurisdictions for clues,⁷⁸ and came to the conclusion that the lower court properly awarded judgment in favor of appellee.⁷⁹ However, the court did not conclude likewise for attorney's fees.

The appellate court determined that since "[t]he heading of chapter 57 in the statute books is 'Court Costs' it is obvious that the Legislature intended to treat this award as part of the only subject matter therein, court costs."⁸⁰ Had an award of attorney's fees been proper, the lower court would have been justified in awarding them under section 57.105 as "costs not included in the final judgment even after a notice appealing the final judgment has been filed."⁸¹

Allen, like *McBain*, treated attorney's fees as "costs."⁸² Although, under the Florida Rules of Civil Procedure rule 1.420(d), costs did not include attorney's fees at the time of the *Randle* decision (one of the cases to which *McBain* referred), once section 57.105 was enacted, at-

73. *Id.*

74. *Id.* at 172-73.

75. *Id.* at 173.

76. *Id.*, citing FLA. STAT. § 731.051 (1957).

77. *Id.*

78. *Id.* The Court reviewed *West v. Day*, 328 Mass. 381, 103 N.E.2d 813 (1952), which cited cases from its own and other jurisdictions.

79. *Id.* at 175.

80. *Id.* at 174.

81. *Id.*

82. 374 So. 2d at 76.

torney's fees became "costs" if they fell within the statute's purview.⁸³

The *Allen* court, to determine the propriety of the attorney's fees which were awarded, chose legislative intent as a method of statutory interpretation to find the prerequisites for the invocation of section 57.105. In an analysis which parallels that of the House of Representatives, the court concluded that a finding of "complete absence" of a justiciable issue of law or fact was akin to a "total or absolute lack" thereof, and "tantamount to a finding that the action is frivolous."⁸⁴ The court analogized the case at bar to *Treat v. State ex. rel. Mitton*.⁸⁵

The *Allen* court used *Treat's* definition of a frivolous appeal:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed . . . one so clearly untenable, or the insufficiency of which is so manifest . . . that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it. . . .⁸⁶

Since the *Allen* court found that a justiciable issue of law was raised, it reversed the lower court's assessment of attorney's fees.⁸⁷ It also held that "[m]erely losing, either on the pleadings or by summary judgment, is not enough to invoke the operation of the statute . . . that the action [has to be] so clearly devoid of merit both on the facts and the law as to be completely untenable."⁸⁸ Perhaps the court went slightly further than the Legislature intended by stating that *both* the facts and the law presented must be completely untenable. However, the analysis and holding more accurately reflect the legislative intent of the statute than any other Florida case.

There is yet another variation to the assessment of attorney's fees.

83. *Id.*

84. 384 So. 2d at 175.

85. 121 Fla. 509, 163 So. 883 (1935).

86. 384 So. 2d at 175.

87. *Id.*

88. *Id.* (emphasis supplied).

In *Department of Revenue v. Gurtler*,⁸⁹ the appellate court made the finding that a complete absence of a justiciable issue of law or fact existed at the trial level and assessed "[o]ne thousand (1,000) dollars in attorney's fees in favor of the appellant,"⁹⁰ pursuant to section 57.105. In the lower court, Gurtler, the appellee, had been successful but the appellate court required that the record be corrected and supplemented. Ultimately, Gurtler conceded at the appellate level that his position at trial had been "baseless."⁹¹ The appellate court reversed and remanded with instructions to enter judgment in favor of the appellant, Department of Revenue, and award it attorney's fees.

In the same light, if the trial record indicates an adequate legal and factual basis has been layed as a foundation⁹² for a claim or defense, an appellate court will find a motion under section 57.105 untenable.⁹³ If attorney's fees are awarded, but the order "contains no finding, as required by statute, that 'there was a complete absence of a justiciable issue of either law or fact raised by the losing party,'" the order is technically deficient.⁹⁴ The case would need to be "remanded to the trial court with directions to make an appropriate finding . . . and thereafter to assess or deny attorney's fees depending on the finding entered. . . ."⁹⁵

III. Other Jurisdictions With Statutes Similar to 57.105

Illinois, has had a statute authorizing the award of reasonable attorney's fees in effect since 1955.⁹⁶ Within the past five years, six other

89. 381 So. 2d 242 (Fla. 4th Dist. Ct. App. 1979).

90. *Id.*

91. *Id.*

92. *Michigan Nat'l Bank of Detroit v. Maierhoffer*, 382 So. 2d 318 (Fla. 3d Dist. Ct. App. 1979).

93. *Id.* at 322.

94. *City of Miami Beach*, 380 So. 2d at 1112.

95. *Id.* at 1114.

96. ILL. REV. STAT. ch. 110, § 41, Historical and Practical Notes (1968). Current legislation, effective November 23, 1977, reads:

§ 41 (Civil Practice Act § 41) Untrue statements.

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court

states have adopted or amended existing statutes similar to section 57.105.⁹⁷

upon motion made within 30 days of the judgment or dismissal.

The State of Illinois or any agency thereof shall be subject to the provisions of this Section in the same manner as any other party.

Where the litigation involves review of a determination of an administrative agency, the court shall include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the state without reasonable cause and found to be untrue.

Id. (Supp. 1980-81).

97. MINN. STAT. ANN. § 549.21 (West 1978):

Reimbursement for certain costs in civil actions.

Upon motion of a party prevailing as to an issue, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees relating to the issue if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith as to that issue. To qualify for an award under this section, a party shall give timely notice of intent to claim an award, which notice shall in any event be given prior to the resolution of the issue. An award under this section shall be without prejudice and as an alternative to any claim for sanctions that may be asserted under the rules of civil procedure. Added by Laws 1978, c. 738 § 5, eff. April 5, 1978.

WIS. STAT. ANN. § 814.025 (West Supp. 1980-81):

814.025 Costs upon frivolous claims and counterclaims.

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith

A. ILLINOIS

The Illinois statute has been interpreted by their courts as an at-

argument for an extension, modification or reversal of existing law.

MASS. GEN. LAWS ANN. ch. 231, §§ 6E-6G (West 1976). 6E provides definitions applicable to sections 6E-6G, and section 6G applies to appeals.

§ 6F. Cost, Expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Upon motion if any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.

If such a finding is made with respect to a party's claim, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims . . . [provisions made for those not represented by counsel omitted].

Apart from any award made pursuant to the preceding paragraph, if the court finds that all or substantially all of the defenses, setoffs or counterclaims to any portion of a monetary claim made by any party who was represented by counsel during most or all of the proceeding were wholly insubstantial, frivolous and not advanced in good faith, the court shall award interest to the claimant on that portion of the claim according to the provisions of the preceding paragraph.

In any award made pursuant to either of the preceding paragraphs, the court shall specify in reasonable detail the method by which the amount of the award was computed and the calculation thereof.

No finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof. No such finding shall be made in any action in which judgment was entered by default without an appearance having been entered by the defendant. The authority granted to a court by this section shall be in addition to, and not in limitation of, that already established by law.

If any parties to a civil action shall settle the dispute which was the subject thereof and shall file in the appropriate court documents setting forth such settlement, the court shall not make any finding or award pursuant to this section with respect to such parties. If an award had previously been made pursuant to this section, such award shall be vacated unless the parties shall agree otherwise.

tempt on the part of "the legislature to penalize the litigant who pleads

COLO. REV. STAT. § 13-17-101 (1977) (Subsections (2) and (4) omitted):
Frivolous or Groundless Actions

13-13-101. Attorney fees. (1) Subject to the provisions of subsection (2) and (3) of this section, in any suit involving money damages in any court of this state, the court shall award, except as this part 1 otherwise provides; as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(3) The court shall not award attorney fees among the parties unless it finds that the bringing, maintaining, or defense of the action against the party entitled to such award was frivolous or groundless. The court must make findings either affirmative or negative as to the matters set forth in this subsection (3).

N.D. CENT. CODE § 28-26-01 (1977):

28-26-01. Attorney's fees by agreement—Exceptions—Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court may, in its discretion, upon a finding that a claim for relief was frivolous, award reasonable actual or statutory cost, or both, including reasonable attorney's fees to the prevailing party. Such costs may be awarded regardless of the good faith of the attorney or client making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim.

IDAHO CODE § 12-121 (1976):

12-121. Attorney's fees.

In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees.

The following two states also regulate attorney's fees but are not discussed in this article:

NEV. REV. STAT. § 18.010 (1979).

18.101 Award of attorney's fees.

1. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.

2. The court may make an allowance of attorney's fees to:

(a) The plaintiff as prevailing party when the plaintiff has not recovered more than \$10,000; or

(b) The counterclaimant as prevailing party when he has not recovered more than \$10,000; or

(c) The defendant as prevailing party when the plaintiff has not sought recovery in excess of \$10,000.

frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit."⁹⁸ An Illinois court dismissed an action on a pre-trial motion, stating that "[o]ne of the purposes of [the Illinois statute] is to prevent litigants from being subjected to harassment by the bringing of actions against them which in their nature are vexations, based upon false statements, or brought without any legal foundation."⁹⁹

The Illinois Statute, designed to prevent abuse of the judicial process,¹⁰⁰ has been in existence longer than any similar statute in other jurisdictions. This has given Illinois courts greater experience in dealing with, and exposure to, problems arising under statutes comparable to section 57.105. Although, it is the most comprehensive law in its category in scope,¹⁰¹ it is more limited than the Florida Statute since its application is discretionary with the trial court.¹⁰² Unless there is clear

3. In awarding attorney's fees the court may pronounce its decision on such fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. No oral application or written motion for attorney's fees alters the effect of a final judgment entered in the action or the time permitted for an appeal therefrom.

5. Subsections 2 to 4, inclusive, do not apply to any action arising out of written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

MD. R.P. 604(b) (1957).

b. Bad Faith—Unjustified Proceeding—Delay.

In an action or part of an action, if the court finds that any proceeding was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the reasonable expenses incurred by the adverse party in opposing such proceeding, including reasonable attorney's fees.

98. *Ready v. Ready*, 33 Ill. App. 3d 145, 178 N.E.2d 650, 658 (1961).

99. *Id.*

100. *Murezek v. Powers Label Co.*, 31 Ill. App. 3d 939, 335 N.E.2d 172, 176 (1975).

101. Compare note 96 *supra* with note 97 *supra*. Attorney fees may be assessed against the State of Illinois.

102. *Johnson v. LaGrange State Bank*, 73 Ill. App. 3d 342, 383 N.E.2d 185, 196 (1978); *Ascardis v. Russis*, 78 Ill. App. 3d 375, 397 N.E.2d 14, 16 (1979); *Howell v. Edelin*, 66 Ill. App. 3d 437, 383 N.E.2d 1224, 1234 (1978); *Laff v. Chapman Performance Prods., Inc.*, 63 Ill. App. 3d 297, 379 N.E.2d 773, 785 (1978). *Brandenberry Park*

abuse of discretion the lower court's decision will not be disturbed on review.¹⁰³

In order for the trial court to award or deny attorney's fees in Illinois there must be a hearing on the matter.¹⁰⁴ At the hearing, the burden of proof is on the movant to "prove that the allegations against him: (1) were made without reasonable cause; (2) not in good faith; and (3) are untrue."¹⁰⁵ Currently, the test does not require that the movant prove a lack of good faith.¹⁰⁶

There is Illinois case law wherein the award of attorney's fees has been reversed because the movant failed to fulfill his burden,¹⁰⁷ and that burden cannot be fulfilled, if the only evidence offered at the hearing pertains to the amount of the fees.¹⁰⁸ An Illinois appellate court will not find abuse of discretion if an award of attorney's fees is well documented in the record;¹⁰⁹ nor will it review a denial of attorney's fees absent abuse of discretion.¹¹⁰ Yet in Illinois, as in Florida, a prevailing party is not automatically awarded attorney's fees—especially if there is a finding that a genuine dispute existed, although it may not have been an issue at the trial.¹¹¹

The allowance of attorney's fees "is an attempt to penalize any

East Apts. v. Zale, 63 Ill. App. 3d 253, 379 N.E.2d 674, 681 (1978). *Farwell Constr. Co. v. Ticktin*, 59 Ill. App. 3d 954, 376 N.E.2d 621, 626 (1978); *Bainerd v. Flannery*, 59 Ill. App. 3d 991, 373 N.E.2d 26, 29 (1978); *Morton v. Environmental Land Sys., Ltd.*, 55 Ill. App. 3d 369, 370 N.E.2d 1106, 1111 (1977); *Dudanas v. Plate*, 44 Ill. App. 3d 901, 358 N.E.2d 1171, 1179 (1976); *Village of Evergreen Park v. Spangler*, 40 Ill. App. 3d 947, 353 N.E.2d 257, 259 (1976); *Murezek v. Powers Label Co.*, 335 N.E.2d at 176.

103. 376 N.E.2d at 626; 370 N.E.2d at 1111.

104. 303 N.E.2d at 1234.

105. 335 N.E.2d at 176. *See also* *Couri v. Home Ins. Co.*, 53 Ill. App. 3d 593, 368 N.E.2d 1029, 1035 (1977); 373 N.E.2d at 29; 383 N.E.2d at 196.

106. 397 N.E.2d at 16.

107. *Medical Modalities Assoc., Inc. v. Quick*, 65 Ill. App. 3d 300, 382 N.E.2d 620, 623 (1978); *Meeker v. Beeson*, 76 Ill. App. 3d 940, 395 N.E.2d 698, 701 (1979).

108. 383 N.E.2d at 196.

109. 379 N.E.2d at 681; *In re Estate of Knutson*, ___ Ill. App. 3d ___, 404 N.E.2d 1003 (1980).

110. 370 N.E.2d at 1111.

111. *Farnot v. Irmco Corp.*, 73 Ill. App. 3d 851, 292 N.E.2d 591, (1979). (A dispute had existed as to whether an individual was employed by a certain party, however, that question was not made an issue at trial due to mutual stipulation).

litigant who pleads false matters and thereby puts undo burden on an opponent to expend money in order for his attorney to disprove such pleadings."¹¹² Since the statute is penal in nature, Illinois courts limit its scope to "those cases falling strictly within its terms."¹¹³

In Florida, the court must make a finding of a complete absence of justiciable issue of law or fact before attorney's fees can be assessed against the losing party.¹¹⁴ If such a finding is made in Illinois, it is discretionary with the court whether attorney's fees will be awarded.¹¹⁵ This interpretation places a double burden on the movant. He must overcome the burden of proof at a special hearing, and if his motion is denied, the movant must prove at the appellate level, abuse of discretion on the part of the trial court—an inherently difficult burden to overcome.

B. NORTH DAKOTA

North Dakota's statute is equivalent to Illinois' and its courts have looked to Illinois case law for guidance in interpreting it.¹¹⁶ The statute, authorizes a court, at its discretion, to award "costs" to the prevailing party in a civil action by way of indemnity for his expenses in the action.¹¹⁷ It was recently amended to include attorney's fees.¹¹⁸

However, attorney's fees will not be "allowed to a party who has successfully defended against an action unless the action was frivolous."¹¹⁹ The finding of frivolousness is initially made at the trial court's discretion.¹²⁰ Reasonable attorney's fees may be awarded to the

112. *Metro-Goldwyn-Mayer, Inc. v. Antioch Theatre Co.*, 52 Ill. App. 3d 122, 367 N.E.2d 247, 257 (1977).

113. 335 N.E.2d at 176. *See also* 372 N.E.2d at 946; 370 N.E.2d at 1111; 358 N.E.2d at 1179.

114. 384 So.2d at 174.

115. *See* note 102 *supra*.

116. *Matter of Estate of Nelson*, 281 N.W.2d 245, 247 (N.D. 1979).

117. N.D. CENT. CODE § 28-26-01 (1943).

118. *See* note 97 *supra*.

119. *Conrad v. Suhr*, 274 N.W.2d 571, 579 (N.D. 1979). *See also* *Peterson v. Hart*, 278 N.W.2d 133, 136 (N.D. 1979).

120. *Corwin Chrysler-Plymouth, Inc. v. Winchester Fire Ins. Co.*, 279 N.W.2d 638, 646 n.4 (N.D. 1979).

prevailing party once such a finding is made.¹²¹

C. MINNESOTA AND IDAHO

Minnesota¹²² and Idaho¹²³ also have discretionary statutes. The statute in Minnesota is considered an enactment of the exception to the general rule, i.e. “[g]enerally attorney’s fees may not be awarded to a successful litigant absent specific contractual or statutory authority [except] where the unsuccessful party has acted in bad faith, vexatiously, wantonly, or for oppressive reason.”¹²⁴

The Minnesota Supreme Court has held that the trial court is in the best position to determine bad faith and other factual issues.¹²⁵ The court gave significant weight to the statute’s legislative history by quoting its author, who “stated to the [Minnesota] Senate Judiciary Committee that this section forces more responsible litigation by imposing costs including attorney’s fees on a party or his lawyer who presses an issue not in good faith—so people have to search through their lawsuits more effectively for what really ought to be litigated.”¹²⁶

Idaho cases on point, deal with the “technical” aspects of the application of its statute. Since the statute is not substantive, but remedial and procedural, retroactive application was proper to a claim arising prior, but tried subsequently, to the statute’s enactment.¹²⁷ However, it is incumbent upon the movant to establish the claim or defense “was being maintained frivolously, unreasonably or without foundation.”¹²⁸ If the movant seeks attorney’s fees under an improper statute, but has established his adversary’s claim is devoid of merit, the

121. *Id.*

122. *Minnesota-Iowa Television Co. v. Wantonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 311 (Minn. 1980).

123. See note 97 *supra* and *Palmer v. Idaho Bank & Trust of Kooskia*, 100 Idaho 642, 603 P.2d 597, 600 (1979); *Furtrell v. Martin*, 100 Idaho 473, 600 P.2d 777, 783 (1979); *Cunningham v. Bundy*, 100 Idaho 456, 600 P.2d 132, 135 (1979).

124. *Cherne Industries, Inc. v. Grounds & Assoc.*, 278 N.W.2d 81, 96 (Minn. 1979).

125. *Id.* at 97.

126. 294 N.W.2d at 311 n.1.

127. *Jensen v. Shank*, 99 Idaho 565, 585 P.2d 1276-78 (1978). See also *Buckalew v. City of Orangeville*, 100 Idaho 460, 600 P.2d 136, 139 (1979), citing *Jensen*.

128. *Matter of Estate of Bowman*, ___ Idaho ___, 609 P.2d 663, 669 (1980).

court may affirm the award if it is proper under another statute.¹²⁹ The assessment of attorney's fees against two or more parties must be pro-rated against each of them, otherwise the case will be remanded for such a determination.¹³⁰

D. COLORADO

The Colorado statute, whose application is discretionary with the trial court,¹³¹ restricts attorney's fees awards to suits involving money damages.¹³² It is clear, however, that a party who "asserts claims in a subsequent action which were compulsory counterclaims in a former proceeding . . ." has asserted frivolous claims¹³³ and attorney's fees would be awarded to the prevailing party.

E. MASSACHUSETTS AND WISCONSIN

Massachusetts and Wisconsin are the two states whose statutes most resemble Florida's. Their statutes also use the word "shall" instead of "may," mandating the assessment of attorney's fees upon a finding of frivolousness. Massachusetts courts have not enforced the statute,¹³⁴ although they have provided a warning of their authority to do so in the future.¹³⁵

129. *Torix v. Allred*, 100 Idaho 905, 606 P.2d 1334, 1340 (1980).

130. 585 P.2d at 1278.

131. *Wood v. Jensen*, ___ Colo. App. ___, 585 P.2d 309, 310 (1978).

132. *In re Marriage of Erickson*, ___ Colo. App. ___, 602 P.2d 909, 911 (1979); *People v. Freeman*, 196 Colo. 238, 583 P.2d 921, 923 (1979).

133. 585 P.2d at 310.

134. *In Hosford v. Rei*, ___ Mass. ___, 377 N.E.2d 427 (1978), judgment was entered prior to the effective date of the statute. "Substantial questions of first impression" prevented the statute from being applicable in *Goodwin Bros. Leasing, Inc. v. Nouis*, ___ Mass. App. Ct. ___, 366 N.E.2d 38, 44 (1977). In *Glynn v. City of Gloucester*, ___ Mass. ___, 401 N.E.2d 886, 888 n.1 (1980), the city "waived" its "appeal from denial of its motion for attorney's fees and costs . . . [because it had] not briefed or argued . . ." the matter. If a party simply presents no evidence before a master, whose findings are not final, attorney's fees cannot be assessed against the party. *Vaught Constr. Co. v. Bertonazzi Buick Co., Inc.*, 371 Mass. 553, 359 N.E.2d 286, 290-91 (1976).

135. *Pollack v. Kelley*, 372 Mass. 469, 362 N.E.2d 525, 530 (1977). "The plaintiff has now been delayed more than three years in obtaining a trial on his claim. The

Recently, a Wisconsin appellate court was presented with factual circumstances that one would imagine to be the basis of a typical frivolous lawsuit.¹³⁶ An individual, who drove an automobile owned by another, was covered by Prudential Property and Casualty Insurance Company.¹³⁷ The driver was also covered by Sentry Insurance Company, but the Sentry policy unambiguously indicated that the individual was not covered in the particular instance.¹³⁸ "Prudential pursued a third-party action against Sentry *after* Sentry [had] provided Prudential with all the material necessary to demonstrate . . . the action was frivolous."¹³⁹ The trial court denied Sentry's motion for costs and reasonable attorney's fees.¹⁴⁰

In its analysis the appellate court noted the weight of the evidence required a finding that Prudential's claim was frivolous.¹⁴¹ It did not have to find abuse of discretion on the lower court's part because "[u]se of the word 'shall' creates a presumption that the statute is mandatory."¹⁴² Therefore, Sentry's motion was well taken and the case was remanded for a determination of the amount of reasonable attorney's fees to be awarded.¹⁴³

IV. Conclusion

As individuals become more conscious of accessibility to the courts and exercise their legal rights, the possibilities of frivolous or groundless lawsuits increases as does the need to provide relief to their "victims." The common law torts of malicious prosecution and abuse of process are insufficient remedies because they require the wronged

two premature attempted appeals have produced nothing for the defendant, and the resulting delay to the plaintiff can serve no purpose but to contribute to the loss of confidence in the courts as the avenue for adjudication of private disputes with reasonable dispatch. The continued use of such delaying tactics in the face of settled law against the presentation of interlocutory appeals may result in sanctions against offenders in appropriate cases in the future." *Id.*

136. *Sommer v. Carr*, 95 Wis. 2d 651, 291 N.W.2d 301 (1980).

137. *Id.* at 302.

138. *Id.* at 303-04 n.2.

139. *Id.* at 301.

140. *Id.* at 302.

141. *Id.*

142. *Id.* at 302 n.1.

143. *Id.* at 304.

party to institute an entirely new lawsuit. The trendsetter states mentioned in this article, provide statutes in which "a party who is put to the defense of a groundless lawsuit has available the remedy of a motion in the original action for an award of attorney's fees."¹⁴⁴

The American rule remains intact in Florida: "attorney's fees may be awarded a prevailing party only under three circumstances, viz: (1) where authorized by contract; (2) where authorized by a constitutional legislative enactment; and (3) where awarded for services performed by an attorney in creating or bringing into court a fund or other property."¹⁴⁵ Section 57.105, falling under the second category, is yet another statute under which attorney's fees can be awarded.

By not making the application of section 57.105 discretionary the Legislature endeavored to create uniformity. The results, the assessment of attorney's fees, would also serve as an admonishment to parties who, but for the statute, would abuse court processes. It is obvious that not all settlements, nor all dismissals, voluntary or otherwise, have groundless foundations. Therefore, a well-documented hearing on the matter will preclude a chilling effect on court accessibility.

The Florida Legislature was concerned that lawsuits were instituted to either force a settlement or gamble with court processes.¹⁴⁶ A party opposing a frivolous claim had to weigh two unpleasant alternatives: to defend his position, or to accept a settlement which ultimately might have been less costly than litigation. A party thrust into this position could only lose confidence in the courts as adjudicators of private conflicts and feel frustrated at such injustice. In this sense section 57.105 is a remedial statute. Although section 57.105 is not a panacea for all court system abuses, it may serve to curtail frivolous claims and defenses.

Bertha P. Sanchez

144. *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685, 691 (1978).

145. *Estate of Hampton v. Fairchild—Florida Constr. Co.*, 341 So. 2d 759, 761 (Fla. 1977), citing *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1967).

146. H.B. 1062-taped debates.

Criminal Law: "Prepare For Boarding:" Coast Guard Authority On The High Seas. United States v. Williams.

*"Like the seas where the vessel was boarded, the problem is deep and shark-infested. Unlike them, the answer is not clearly charted. We voyage toward a conclusion"**

The Fifth Circuit Court of Appeals recently attempted to "harmonize the discordant precedent that has evolved"¹ in the circuit with regard to high seas searches and seizures conducted by the United States Coast Guard. The resulting *en banc* decision has reinforced the plenary authority of the Coast Guard to stop vessels on the high seas which are suspected of smuggling, or attempting to smuggle, contraband into the United States.² Judge Alvin B. Rubin, who concurred in the result in

* United States v. Cadena, 585 F.2d 1252, 1255 (5th Cir. 1978) (Rubin, J.).

1. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc).

2. The United States Coast Guard has the authority to stop and board a vessel of any nationality in international waters when a reasonable suspicion of a violation of United States laws exists. 14 U.S.C. § 89(a) (1976); 19 U.S.C. § 1581 (1976). The applicable provisions of the statutes are as follows:

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United

Williams, criticized the majority for misusing the case “to expound a mini-treatise on the subject of offshore law enforcement.”³ An additional concurrence notes that *Williams*’ conviction could have been upheld on basic principles of international law due to Panamanian consent, the country in which the seized ship was registered.⁴

This comment will discuss the analyses employed by the *en banc* panel in light of the precedent in the Fifth Circuit which led to *Williams*. The discussion is divided into four areas: the jurisdictional authority of the Coast Guard, the seizure and subsequent search of the vessel, the effect of Panama’s consent to the boarding, and finally, the international legal ramifications of the decision.

States by, such vessel, liable to forfeiture or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine and penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

- (1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and
- (2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States. Aug. 4, 1949, c. 393, § 1, 63 Stat. 502; Aug. 3, 1950, c. 536, § 1, 64 Stat. 406.

§ 1581. Boarding vessels

Customs officers

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

3. 617 F.2d at 1094 (concurring opinion).

4. *Id.* at 1092.

FACTS

On January 30, 1978, the Panamanian merchant vessel "M/V PHGH" was sighted in international waters by the United States Coast Guard Cutter "ACUSHNET."⁵ Commander A.C. Peck, Captain of the ACUSHNET, identified the PHGH as one of a number of vessels suspected of being involved in drug trafficking. As the ACUSHNET approached the PHGH, the latter vessel hoisted a distress signal flag. The Coast Guard then requested by radio that the PHGH state its origin, destination, cargo and reason for flying the distress flag.⁶ The

5. The PHGH was spotted five days earlier by John Stevenson, a Drug Enforcement Administration (DEA) pilot, who was flying a mission to look for drug trafficking vessels. The PHGH was anchored about one and a half miles off the coast of Colombia, with several smaller craft rendezvousing with her. Stevenson identified the vessel as the PHGH and reported the observation to DEA Intelligence in El Paso, Texas.

Testimony at Williams' bench trial revealed that the PHGH had taken on a cargo of sulphur in Venezuela, at which time the ship's owner, Emanuel Karavias, was aboard. The ship's captain informed crew members of plans to pick up cargo off the coast of Colombia and deliver it somewhere in the Gulf of Mexico. The vessel proceeded to the coast of Colombia and anchored offshore, at which time several smaller vessels came alongside the PHGH. As the loading of cargo onto the PHGH began, defendant Williams came on board the vessel. Karavias had previously departed the vessel in Aruba.

6. This procedure followed by the Coast Guard was best described in *United States v. May May*, 470 F. Supp. 384, 388-89 (S.D. Tex. 1979), in the district court's findings of fact in support of denials of motions to suppress and motions to dismiss for lack of jurisdiction. These facts were developed during a final pre-trial hearing from evidence and testimony elicited from five Coast Guard officers. The relevant findings are as follows:

When a Coast Guard vessel is on patrol and encounters another vessel, it is standard operating procedure for the patrol vessel to attempt to determine the nationality of the encountered ship. Indeed, it is a common practice in the military to identify all surface traffic in the patrol area by name, home port and nationality. If the vessel is not properly identified, the Coast Guard vessel will check with the country of the flag being flown by the ship being investigated to determine if the ship is in fact registered to that country. If the ship is flying the proper flag and there is no indication or reasonable suspicion of illegal activity, then the ship is passed on. If, however, there is evidence of illegal activity, especially of illegal drug activity, the information is passed along by the patrol vessel through the chain of command to the country of the ship being investigated, and a request is made for permission to take action as agent of that country. If the ship is not flying the correct flag, the Coast Guard will continue an investigation to identify

PHGH replied that she was enroute from Aruba to Mobile, Alabama, carrying sulphur, and that no assistance was needed for what was explained as a generator problem.

The ACUSHNET maintained visual surveillance of the PHGH, and at approximately five o'clock on the morning of February 1, 1978, the crewmen of the PHGH appeared on deck waving clothes, flashlights and giving hand signals.⁷ Later that day, a crewman on

the ship, which investigation will consist of boarding the ship to check its documentation. Under applicable international law, vessels on the high seas demonstrate their nationality by the flag they fly and the documents issued by the country whose flag is being flown. In addition, all vessels have a beam number permanently affixed to or marked into the main beam of the vessel. This beam number is similar to an automobile's vehicle identification number, and is usually kept by the flag country of the vessel. The beam number is also noted on the vessel's documents; if no documents are available, other sources, such as Lloyds of London, can be contacted in an attempt to identify the country to which the vessel is registered. Under Coast Guard policy, the boarding personnel generally should first check the pilothouse and the captain's cabin for the ship's documents; both of these places are usually located above the decks. In those situations where a ship suspected of being involved in illegal activity is flying the proper flag, it has been the Coast Guard's experience that the country whose flag is being flown will usually grant permission to the Coast Guard to board and investigate the vessel. Panama, for example, has always granted its permission, while Colombia is the only nation which has denied permission to board.

The Coast Guard maintains and periodically updates a list of vessels suspected to be involved in illegal activities. This list is provided to Coast Guard vessels on patrol.

... [I]t is a fact that the names of vessels involved in transporting narcotics are routinely and frequently changed. It is also a fact that vessels can legitimately carry the flags of various countries, flying them as a courtesy when they enter the ports or territorial waters of those nations. However, such flags are usually flown from yardarms, not from the main mast.

The following factors are looked to by Coast Guard patrol vessels in determining whether an encountered vessel should be considered suspicious: improper markings; no permanently attached name or home port; failure to fly a flag; failure to identify itself; the condition of the vessel; and unusual activities aboard the vessel.

7. This activity, which continued for some six hours, was apparently for the purpose of attracting the attention of the Coast Guard and averting the possibility that the ACUSHNET would move on without further investigation. This point was argued by the United States as elevating reasonable suspicion to the level of probable cause. Supplemental Brief for Appellee on Rehearing En Banc at 13, *United States v. Williams*,

board the PHGH dove overboard and swam to the ACUSHNET, reporting there was "dirty business" on board the PHGH. The merchant vessel was anchored in the water at this time. The ACUSHNET relayed all this information to its headquarters in Miami.⁸

On February 2, 1978, Commander Peck received permission from Panama to board the PHGH, search the ship, and, if contraband were discovered, to take the ship and all those on board into United States custody for criminal prosecution.⁹ An armed Coast Guard party was dispatched to the PHGH, whereupon one guardsman, checking for the vessel's official registration number, discovered 21,680 pounds of marijuana in the ship's cargo hold. The PHGH was seized, her crew placed under arrest, and then towed into Mobile, Alabama.¹⁰

Williams was convicted in the United States District Court for the Southern District of Alabama of conspiring to import marijuana into the United States, pursuant to 21 U.S.C. § 963.¹¹ A panel of the Fifth

617 F.2d 1063 (1980).

8. Since the time of the original sighting of the PHGH, the Coast Guard was in continual radio contact with its Seventh District Headquarters in Miami. It was through this channel that the Coast Guard contacted the Panamanian Embassy, requesting permission to board the PHGH.

9. 617 F.2d at 1070. Authority to stop and board the vessel is derived from two sources: first, under 14 U.S.C. § 89 (1976); which reads in part "if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty, such vessel or such merchandise, or both, shall be seized." Second, generally established principles of international law provide that "[ships] . . . shall be subject to [the flag state's] exclusive jurisdiction on the high seas." Convention on the High Seas, September 30, 1962, Art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200.

10. Upon arrival in Mobile, Alabama, a DEA agent ascertained that documents on board the vessel indicated that the PHGH was bound for Mobile, although the legitimate cargo was destined for Peru. 617 F.2d at 1071. Regarding litigation concerning the legitimate cargo, see *Rayon y Celanese v. United States*, 79 Am. Mar. Cases 2682 (S.D. Ala. 1979).

11. "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 963 (1976). The offense referred to under § 963 is contained in § 952 as follows:

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to im-

Circuit Court of Appeals affirmed the conviction,¹² and Williams then petitioned the court for a rehearing *en banc*.¹³ This *en banc* proceeding gave rise to the thirty-seven page opinion affirming the district court's holding, which, in author Judge Tjoflat's words, was meant to clear up the "muddled case law" of the Fifth Circuit in this area.¹⁴

THE COURT'S ANALYSIS

The *en banc* majority employed a wide-ranging analysis encompassing all the issues relevant to the disposition of the case. It affirmed the panel's decision,¹⁵ but disagreed with its analysis of the fourth amendment issue.¹⁶ The panel had held that "before the government may order a foreign vessel to stop, . . . reasonable suspicion that criminal activity (is) afloat must be shown."¹⁷ The panel then found that this standard had been met.¹⁸

The *en banc* court disagreed, preferring not to rely on cases involving land-locked searches and seizures as had the panel. Consequently, it set out upon the hazardous waters of prior Fifth Circuit decisions¹⁹ in order to clear up the "muddled state of (its) precedent"²⁰ in the area of nautical search and seizure.

port into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter.

21 U.S.C. § 952 (1976).

12. United States v. Williams, 589 F.2d 210 (5th Cir. 1979).

13. Of the 26 judges sitting on the Fifth Circuit Court of Appeals, 23 took part in the *en banc* decision. 617 F.2d at 1069.

14. 617 F.2d at 1072.

15. 589 F.2d at 210.

16. 617 F.2d at 1071.

17. 589 F.2d at 214.

18. *Id.*

19. United States v. Postal, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 61 (1979); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (*en banc*); United States v. Erwin, 602 F.2d 1183 (5th Cir. 1979) (*per curiam*); United States v. One (1) 43 Foot Sailing Vessel, 405 F. Supp. 879 (S.D. Fla. 1975), *aff'd*, 538 F.2d 694 (5th Cir. 1976) (*per curiam*); United States v. Odom, 526 F.2d 339 (5th Cir. 1976).

20. 617 F.2d at 1071.

Before discussing the prior Fifth Circuit precedent in this area the court discussed the application of the United States Supreme Court's "*Ramsey*"²¹ analysis." The two-part analysis employed in *Ramsey* "implies that a warrantless seizure or search in the complete absence of authority — a lawless governmental intrusion — is unconstitutional per se."²² Once statutory authority exists for the search or seizure, the second issue pertains to the reasonableness of the search or seizure as guided by the fourth amendment.²³ In this light, the court divided its discussion into three parts: statutory authority; a fourth amendment analysis; and the effect of Panama's consent to the seizure and search.²⁴

A. Statutory Authority Of The Coast Guard

The United States Coast Guard is charged with enforcing, or assisting in the enforcement of, "all Federal laws on and under the high seas and waters subject to the jurisdiction of the United States."²⁵ Two federal statutes empower the Coast Guard to stop, search and seize a vessel which is subject to the jurisdiction of the United States.²⁶ 14 U.S.C. § 89(a) is the only authority for search and seizures beyond the territorial sea²⁷ of the United States. Foreign vessels on the high seas

21. United States v. Ramsey, 431 U.S. 606 (1977).

22. 617 F.2d at 1074.

23. *Id.* U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

24. 617 F.2d at 1075.

25. 14 U.S.C. § 2 (Supp. 1980). *See also* U.S. CONST., art. I, § 8, cl. 10: Congress shall have the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations"

26. 14 U.S.C. § 89; 19 U.S.C. § 1581 (1976).

27. There are basically three divisions of the waters of the seas: internal waters, territorial seas, and high seas. The latter encompasses an area known as the contiguous zone. The three-mile limit of the territorial sea is "that body of the seas which is included with a definite maritime belt immediately adjacent to a state's coastline." Carmichael, *At Sea With the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 56 (1977). Seaward of this three-mile limit is the high seas. However, for implementation of certain United States laws, there is a contiguous zone which extends nine miles from the three-mile boundary, or, in other words, to a boundary between three and twelve miles

have gradually drifted into the grasp of section 89 (a) through expansive holdings in a long line of recent Fifth Circuit cases.²⁸

In *United States v. Warren*,²⁹ Judge Tjoflat also wrote for the *en banc* majority. *Warren* held that section 89(a) affords the Coast Guard a plenary power to "apprehend and board any vessel of the American flag . . . beyond the twelve-mile limit."³⁰ Exercise of this plenary power need not be founded on any particularized suspicion. Thus, in *Warren*, the Coast Guard's stopping of an American vessel at a point approximately seven hundred miles from the United States³¹ was upheld even though Coast Guardsmen and Drug Enforcement Administration agents boarded to "conduct a safety and documentation inspection and to look for obvious customs and narcotics violations."³² The majority rested its holding on the unusual facts surrounding the voyage itself and the actions of the crewmen on board.³³

In *United States v. Cadena*,³⁴ Judge Alvin B. Rubin (who concurs

from the coast.

28. See generally cases cited note 19 *supra*.

29. 578 F.2d 1058 (5th Cir. 1978) (*en banc*), *rehearing denied*, 586 F.2d 608 (1978) (*en banc*), *rehearing granted*, 589 F.2d 254 (1979) (*en banc*), 612 F.2d 887 (1980) (*en banc*), *cert. denied*, ___ U.S. ___, 100 S. Ct. 2928 (1980).

30. *Id.* at 1064-65.

31. *Id.* at 1061.

32. *Id.* at 1065.

33. In the early evening of August 19, 1974, the Coast Guard cutter STEADFAST sighted the American shrimping vessel STORMY SEAS as she sailed southward between Haiti and Cuba, some 700 miles from the United States coast. The STEADFAST hailed the STORMY SEAS and told her to prepare for boarding. A party of three Coast Guard officers, an agent of the DEA and a Customs Service Agent proceeded to board and found nothing on the ship's papers indicating travel to a foreign port. During subsequent questioning and a cursory search, it was discovered that on board there were three pistols and a small amount of marijuana, which aroused the suspicion of the Coast Guard officers. Further questioning led the defendants to producing envelopes containing \$7,000 in cash. The defendants were then advised of their *Miranda* rights and that they may have violated United States currency laws. Subsequently, the officers found envelopes and a briefcase containing a total of \$41,500 in cash and 46,800 Colombian pesos. The defendants were again given *Miranda* warnings and arrested.

34. 585 F.2d 1252 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (1979). This case involved a Coast Guard boarding of a vessel of unknown nationality on the high seas. The Coast Guard cutter hailed the freighter, which was sailing approximately 200 miles off the Florida coast. The freighter ignored the Coast Guard and continued to sail away. Only after machine gun fire and a cannon volley did the freighter stop and per-

in the result in *Williams*) wrote for a Fifth Circuit panel. The court in *Cadena* held "the Coast Guard is empowered to search and seize any vessel on the high seas that is subject to the jurisdiction or operation of any law of the United States."³⁵ Additionally, section 89(a) is not limited on its face to domestic vessels or domestic waters.³⁶ In *Cadena*, the panel struggled with the notion of jurisdiction over the crime as opposed to jurisdiction over the vessel.³⁷ Indeed, no United States statute expressly asserts "jurisdiction" over a foreign vessel on the high seas.³⁸ In this restrictive light, the panel in *Cadena* was able to narrow the analysis down to the fact that ". . . authority of the Coast Guard to act upon the high seas must depend upon whether a vessel sailing there is 'subject to . . . the operation of any law of the United States.'"³⁹ The court then found that Congress intended the domestic conspiracy statute⁴⁰ to apply extraterritorially, and therefore held that a conspiracy to violate a federal narcotics statute is an offense which is subject to the jurisdiction of the United States.⁴¹

*United States v. Postal*⁴² also involved Coast Guard seizure of a foreign vessel on the high seas.⁴³ The panel in *Postal* relied on *Warren*

mit boarding by the Coast Guard. The boarding party found plastic and burlap sacks in the holds containing 54 tons of marijuana. Appellants were indicted and convicted on charges of conspiring to import and conspiring to distribute marijuana in violation of 21 U.S.C. §§ 963 and 846, respectively. Appellants challenged the conviction on the legality of the search and seizure, but the Fifth Circuit Court of Appeals affirmed the conviction, finding the attempted flight an exigent circumstance, which, coupled with probable cause, justified the warrantless search.

35. *Id.* at 1256, 1257 (footnote omitted).

36. *Id.* at 1257.

37. *Id.* at 1257-58.

38. *Id.* at 1259. See generally Carmichael, *supra* note 27. See also 18 U.S.C. § 7 (1976) (Special Maritime and Territorial Jurisdiction of the U.S.); and 19 U.S.C. § 1701 (1976) (Customs Enforcement Areas Declarable by the President).

39. 585 F.2d at 1259.

40. 21 U.S.C. § 963 (1976). See also *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975).

41. 585 F.2d at 1259.

42. 589 F.2d 862 (5th Cir. 1979).

43. Judge Tjoflat, writing for the Fifth Circuit accurately described the facts as "bizarre." The Coast Guard cutter CAPE YORK first sighted the defendant's vessel, LA ROSA, a 51-foot sailboat, approximately 8.5 miles off the Florida Keys. Because the LA ROSA displayed neither flag nor home port on the stern, the CAPE YORK approached to

and *Cadena* to hold that the Coast Guard had the proper authority for boarding a foreign vessel on the high seas. *Postal* can be distinguished in that it involved a breach of the High Seas Convention⁴⁴ which resulted from a search and seizure on the high seas. The panel held that the applicable provision of the High Seas Convention was not self-executing.⁴⁵ When the United States ratified the treaty, it was not incorporated into the domestic law of the United States.⁴⁶ Through such an analysis, the court was able to hold that a "mere violation" of international law would not supply a defense to the court's jurisdiction.⁴⁷

The Coast Guard continues to be afforded a plenary power through section 89(a) in its continuing battle against illicit drug trafficking on the high seas.⁴⁸ Recent cases in the Fifth Circuit have reaffirmed this statutory authority of the Coast Guard.⁴⁹

determine the vessel's nationality, origin and destination. Two of the defendants displayed a flag of the Grand Cayman Islands, while defendant *Postal* responded that the crew was Australian. After contacting Coast Guard operations in Miami, the CAPE YORK decided to board the LA ROSA. Defendant *Postal* resisted the boarding, but finally agreed to allow one officer to board. Soon after the officer boarded, defendant *Postal* asked, "Can you be bought?" *Id.* at 866. The officer assured *Postal* that he could not, and, after a quick search, the officer left the boat. A second boarding took place approximately two and one-half hours later, during which time the LA ROSA had dramatically changed course. Upon boarding the second time, the defendants were read their *Miranda* warnings, and, after a brief conversation, defendant *Postal* asked, "Oh, does that mean you want to see the pot?" *Id.* at 867. One of the Coast Guard officers then found numerous bales of what appeared to be marijuana. The defendants were then arrested. One of the defendants then offered a Coast Guardsman a drink, proclaiming, "We're celebrating, first time we've been busted." *Id.* at 868.

44. Convention on the High Seas, September 30, 1962, Art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200.

45. Treaties may be considered self-executing so as to take effect without legislative implementation when their terms clearly convey such an intention and provide sufficient detailed standards for executive/administrative application. *Foster v. Neilsen*, 27 U.S. (2 Pet.) 253 (1829).

46. *Cf. The Paquete Habana*, 175 U.S. 677 (1900) (incorporation of customary rules of international law.)

47. 589 F.2d at 884.

48. *See generally High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 735 (1980).

49. *See United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980); and *United States v. D'Antigniac*, No. 79-5007 (5th Cir. filed Aug. 15, 1980).

B. Constitutional Requirements Of Search And Seizure On The High Seas

The majority in *Williams* relies on the holding of *United States v. Cadena* and accepts the premise that the protection of the fourth amendment extends to foreign vessels on the high seas.⁵⁰ Prior to the first panel decision in *Williams*,⁵¹ the Fifth Circuit had not attempted to define the minimum requirements of the fourth amendment in a section 89(a) context. The first panel held that “before the government may order a foreign vessel to stop, . . . reasonable suspicion that criminal activity (is) afloat must be shown.”⁵² The *en banc* majority disagreed with the panel in its use of such “extremely broad” language with regard to a fourth amendment standard applied to a nautical search and seizure.⁵³ The adoption of such a standard implied to the *en banc* majority that the panel was of the opinion that “Section 1581 and other sources of authority . . . providing for the seizure of vessels without suspicion of criminal activity are unconstitutional.”⁵⁴ In light of such a contrary holding to past Fifth Circuit precedent,⁵⁵ the panel found it necessary to discuss the constitutional limitations on the initial seizure of the PHGH.⁵⁶

1. THE SEIZURE⁵⁷

“There is by act of God, nature, the Congress, and the activities of

50. 589 F.2d at 214. “The applicability of the fourth amendment is not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment.” 585 F.2d at 1262.

51. 589 F.2d at 210.

52. *Id.* at 214.

53. 617 F.2d at 1078.

54. *Id.* at 1079. The majority panel has been criticized for its references to section 1581, which clearly does not apply to vessels on the high seas. 617 F.2d 1063, 1094 (concurring opinion).

55. See generally cases cited note 19 *supra*.

56. 617 F.2d at 1079.

57. “The Coast Guard plainly “seized” the PHGH within the meaning of the fourth amendment when they stopped and boarded the vessel. Even the mere stopping of a vessel, without a boarding, is a fourth amendment “seizure” since the governmental action restrains the vessel’s freedom to proceed.” *Id.* at 1071 n.1. Seizure through-

man a great difference between the landlocked vehicle and the nautical vessel”⁵⁸ The decisions of the Fifth Circuit should be included in the above quote for their seemingly Reverian “one if by land; two if by sea” application of the fourth amendment.⁵⁹

Ever since this nation’s first customs statute in 1789,⁶⁰ the “revenue cutters” (which have evolved statutorily into the modern day United States Coast Guard Cutters) have been empowered to seize American vessels on the high seas.⁶¹ This 1789 custom statute’s provision for the search and seizure of vessels has been suggested by the Supreme Court as being “plenary” and “reasonable.”⁶² In this light, the *Williams* panel reiterates the *Ramsey* court’s belief that “the first Congress thought that the fourth amendment permitted the stopping and searching of vessels in the absence of any suspicion of criminal activity.”⁶³

The Fifth Circuit reconfirmed the notion that “the fourth amendment does not necessarily require any sort of suspicion of criminal activity before a vessel may be stopped at sea”⁶⁴ In *Williams*, the court holds that “the Coast Guard’s seizure of the PHGH easily satisfied the fourth amendment’s requirement of ‘reasonableness.’”⁶⁵ The panel arrived at a “reasonableness” standard for the seizure of vessels at sea through analogy to similar standards of international law.

A doctrine of international maritime law — the right of approach⁶⁶ — allows for visitation on the high seas. This visitation is a

out refer(s) to the stopping or the “stopping . . . and boarding of nautical vessels rather than to the expropriation of contraband or evidentiary material.” *Id.*

58. *United States v. Ingham*, 502 F.2d 1287 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

59. 617 F.2d at 1095.

60. Section 24 of the Act [of July 31, 1789] granted Customs officials “full power and authority” to enter and search “any ship or vessel, in which they have reason to suspect any goods, wares or merchandise subject to duty shall be concealed” *Id.* at 1079 citing *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). Act of July 31, 1789, ch. 5, 1 Stat. 29.

61. 617 F.2d at 1079. *See also* *Maul v. United States*, 274 U.S. 501 (1927).

62. *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977).

63. 617 F.2d at 1079. *See* note 23 *supra* for the text of the fourth amendment.

64. 617 F.2d at 1082.

65. *Id.* at 1084.

66. *Id.* at 1076, construing the Convention on the High Seas, September 30,

verification right which is granted to warships⁶⁷ when there is reasonable ground for suspecting that a ship is engaged in piracy, engaged in the slave trade, or of the same nationality as the warship.⁶⁸ In *United States v. Cortes*,⁶⁹ a Fifth Circuit panel found a boarding by the Coast Guard reasonable for fourth amendment purposes. This right of approach was found constitutionally reasonable because

Under a well-established rule of international law, known as the Right of Approach, the cutter had the authority to sail up to the unidentified vessel to ascertain her nationality . . . [The Coast Guard] had justifiable suspicion that the [seized vessel] was attempting to conceal its identity and activities. Under these circumstances, the boarding of the vessel to search for registration papers or other identification was not unreasonable for Fourth Amendment purposes.⁷⁰

Thus, the *en banc Williams* court viewed section 89(a)'s provision permitting seizure of a foreign vessel in international waters as "at least as reasonable as the provision for seizures of vessels set out in . . . article 22 [of the High Seas Convention]."⁷¹ This analogy is reinforced in the court's opinion by reference to other treaties entered into by the United States⁷² which have permitted restricted intrusions into vessels on the high seas.

The majority has therefore relied on standards espoused at international law to attach the reasonableness standard to seizures at sea. In this light, what has been considered reasonable on land does not automatically control what is reasonable on the high seas.⁷³

1962, Art. 22(2), 13 U.S.T. 2312, T.I.A.S. No. 5200.

67. A Coast Guard cutter is a warship under international law. *See Carmichael, supra* note 27, at 52 n.6.

68. 617 F.2d at 1076.

69. 588 F.2d 106 (5th Cir. 1979). In this case, the Coast Guard had justifiable suspicion that the vessel was attempting to conceal its identity and activities. The Coast Guard used the "right of approach" doctrine as authority for boarding.

70. 617 F.2d at 1082.

71. *Id.* at 1084.

72. *See, e.g.,* Convention for the Prevention of Smuggling of Intoxicating Liquors, January 23, 1924, United States-Great Britain, art. II(1), 43 Stat. 1761, cited with approval in *Williams*, 617 F.2d at 1083-84.

73. 617 F.2d at 1084.

2. THE SEARCH

In its discussion of the Coast Guards's statutory authority, the majority found that "Section 89(a) provided for searches of vessels in the complete absence of suspicion that contraband or evidence of criminal conduct will be found in the particular place to be searched."⁷⁴ The search of the PHGH, based upon all the facts in the case, was clearly authorized. The next issue became whether any fourth amendment rights of Williams may have been violated by the authorized search.

Once again, analogy to the international requirements of a search under Article 22 of the High Seas Convention was employed. "[If] any suspicion remains after the vessel's documents have been examined,"⁷⁵ the permissible procedure is to send a boarding party to examine the vessel's main beam identification number.⁷⁶ While in the process of locating this number, the Fifth Circuit holds that "no one, not even a person with a proprietary interest in the vessel and in the cargo, could conceivably have any legitimate expectation of privacy with regard to any objects that would be in the plain view (or smell) of a person conducting such an identification check."⁷⁷

In *United States v. Freeman*,⁷⁸ the panel recognized that "the national frontiers of oceans are much more difficult to police than the territorial boundaries of the land."⁷⁹ Through dicta from *Church v. Hubbard*,⁸⁰ the notion of a less restrictive standard governing searches on the high seas arose. Chief Justice Marshall noted that a nation has the right to prohibit certain commerce. Thus, "any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries"⁸¹

The court did not find probable cause or the warrant requirement

74. *Id.* at 1085.

75. *Id.* at 1086.

76. *Id.* See discussion in note 6 *supra*.

77. 617 F.2d at 1086.

78. 579 F.2d 942 (5th Cir. 1978).

79. *Id.* at 946.

80. 6 U.S. (2 Cranch) 187 (1804).

81. *Id.* at 235.

characteristic of land-locked searches to be applicable on the high seas. This conclusion was based upon the court's observations that: (1) the frontiers of the oceans are more difficult to police than the territorial boundaries of the land; (2) any expectation of privacy on the seas is limited by extensive federal and international regulation of shipping and boating; (3) drug smuggling is a massive problem; (4) practical problems exist if the Coast Guard were required to obtain warrants in order to conduct a search on the high seas; and (5) the Congress that enacted the first customs statute and proposed the fourth amendment for ratification did not intend the fourth amendment requirement to be applicable on the seas.⁸²

In this light,⁸³ the *Williams* court concludes that "reasonable suspicion is the appropriate fourth amendment standard by which to judge section 89(a) searches of the 'private' areas . . . of the holds of vessels in international waters"⁸⁴ In order to search public or plain view areas of a vessel upon a section 89(a) boarding, however, the appropriate standard is the reasonableness of the stop.⁸⁵ There is no requirement of suspicion that any particular evidence of contraband will be found.

C. The Effect Of Panama's Consent

The court noted that the major ramification of a nation's violation of international law is political.⁸⁶ In this light, if an aggrieved nation wishes to assert its rights under a treaty it may ask the government to dismiss the charges.⁸⁷

82. 617 F.2d at 1087-88.

83. It is apparent that public policy concern has been an overriding consideration throughout the court's opinion. This is reflected in opening dicta stating that "the ambiguity and inconsistency of the case law in this circuit has substantially impeded the counter-smuggling activities of the Coast Guard and the Customs Service." *Id.* at 1072.

84. *Id.* at 1088 (emphasis supplied).

85. *Id.* at 1089. This type of "search," authorized by section 89(a), is limited to administrative searches.

86. *Id.* at 1089, citing *Church v. Hubbard*, 6 U.S. at 239.

87. As Chief Justice Marshall intimated in 1804, the major ramification of a nation's violation of international law is political: "If [a nation's actions in enforcing its laws] are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to

The majority concluded that the consent of Panama to the boarding, search and seizure of the PHGH constituted a waiver by Panama to assert its rights on behalf of its nationals. This is clearly correct under the analyses of *Postal* and *Cadena*.⁸⁸ It is clear that although "the sea is the common highway of all, and that no nation or ship has a universal right to stop and search other vessels on the high seas,"⁸⁹ *Williams* has effectively held that a nation may stop and board ships on the high seas that it has cause to believe may be engaged in preparation for the commission of a crime within that nation's jurisdiction. Such an exercise of jurisdiction is founded upon international law which gives a nation the right to assert jurisdiction over crimes which have an effect inside its territory regardless of where that crime occurs.⁹⁰

CONCLUSION

It is quite evident there is a major problem of increased drug smuggling into the area which comprises the Fifth Circuit.⁹¹ Additionally, there has been great public outcry for the government to put a strangle hold on this trafficking. The *Williams* court has echoed the need for the continued success of the counter-smuggling activities of the Coast Guard and Customs Service. However, this great public need does not negate the constitutional safeguards which characteristically attend our nation's law enforcement activities. Perhaps the Fifth Circuit, through *Williams*, is applying an overreaching and unlimited in-

secure their laws from violation, they will be submitted to." 6 U.S. at 234.

88. *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978), *rehearing denied*, 588 F.2d 100 (1979); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 61 (1979).

89. *Rayon y Celanese v. United States*, 79 Am. Mar. Cases 2682, 2685 (S.D. Ala. 1979), citing *The Marianna Flora*, 24 U.S. (1 Wheat) 1 (1826).

90. *See Strasheim v. Daily*, 221 U.S. 280, 285 (1911) (Holmes, J.).

91. The states comprising the Fifth Circuit have a coastline of 2,211 miles, or approximately seven percent of the coastline of the North American continent. As a result of the geographical susceptibility, the United States Coast Guard seized 2.15 million pounds of marijuana in 1978, which is estimated to be only 10-15% of the total flow into the United States. May May, 470 F. Supp. at 384. U. S. DEP'T COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1979, at 207, Table 341.

terpretation of the statute.

Section 89(a) appears, in its present application by the United States Coast Guard, to be in direct conflict with the High Seas Convention.⁹² Exercise of jurisdiction over a vessel on the high seas is a right expressly reserved in the nation under whose laws that vessel is registered.⁹³ Indeed such an unrestricted exercise of statutory authority may inevitably force the United States into a significant international incident.

The current session of Congress has reiterated its concern over increased drug smuggling into the United States.⁹⁴ With laws such as section 89(a) and the newest proposals by Congress, the United States appears to be exercising its jurisdiction over a frontier traditionally viewed as neutral and open to all the nations of the world.

Douglas M. McIntosh
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92. Convention on the High Seas, September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200.

93. *Id.* arts. 5 & 6.

94. H.R. 2538, 96th Cong., 1st Sess. (1979), Pub. L. No. 96-350, 3 Nat'l L.J. 3, 25 (October 20, 1980) (to be codified at 21 U.S.C. § 955 (a)). The language found in the new law applicable to smuggling contraband into the United States is as follows: "(d) It is unlawful for any person to possess, manufacture, or distribute, a controlled substance —

(1) intending that it be unlawfully imported into the United States; or

(2) knowing that it will be unlawfully imported into the United States."

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Criminal Law: Exclusionary Rule

United States v. Williams

The “good faith” exception to the exclusionary rule recently received explicit impetus from the Fifth Circuit Court of Appeals. Meeting en banc,¹ a thirteen judge majority held in *United States v. Williams*² that evidence discovered by police officers acting in the reasonable good faith that their action was authorized, should not be suppressed merely because this reliance later proved to be unjustified. In coming to this conclusion, the court looked to the purpose of the rule, its success at achieving that purpose, and its effect on the field of criminal justice. Based on these factors, and acknowledging the current contraction of the exclusionary rule, the Fifth Circuit became the first federal appellate court to recognize such an exception.

THE EXCLUSIONARY RULE: HISTORICAL OVERVIEW

The origin of what has become known as the “exclusionary rule” is rooted in the fourth amendment.³ However, the modern effect of the rule was first promulgated 110 years after the ratification of the amendment.⁴ Until that time, the area had been a largely “unexplored territory.”⁵ Then, in 1914, the Supreme Court held that evidence

1. The case was reheard en banc on the court's own motion. The panel decision is reported as *United States v. Williams*, 594 F.2d 86, 98 (5th Cir. 1979).

2. 622 F.2d 830 (5th Cir. 1980).

3. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

4. *Boyd v. United States*, 116 U.S. 616 (1886), adopted the exclusionary rule while disallowing evidence which the defendant was compelled to produce in violation of the fifth amendment. See J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 49-61 (1966).

5. LANDYNSKI, *supra* note 4, at 49.

wrongfully seized by federal officials was not to be admitted in criminal or civil trials.⁶ In keeping with the view that the fourth amendment was not applicable against the states, this decision was only binding on federal officials. This concept was affirmed in 1949⁷ subject to subsequent limitations.⁸ The exclusionary rule was enforced in state courts and against state officials in 1961 when the Court, through the due process clause of the fourteenth amendment, handed down the landmark decision of *Mapp v. Ohio*.⁹

THE PURPOSE OF THE RULE

Three underlying purposes have emerged as a logical rationale for the exclusionary rule. The initial purpose was to protect the privacy of individuals against illegal searches and seizures. However:

[T]he Supreme Court later downgraded the protection of privacy rationale, perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips — the frequent objects of search and seizure.¹⁰

As this rationale fell in disfavor, proponents of the rule turned to a different analysis. In time, a second reasoning developed. It was believed that using illegally obtained evidence brought the court system into disrepute and allowed the judicial system to become tainted by working in partnership with lawbreakers (police who obtain evidence illegally).¹¹ This thought was succinctly stated by Justice Brandeis

6. *Weeks v. United States*, 232 U.S. 383 (1914).

7. *Wolf v. Colorado*, 338 U.S. 25 (1949).

8. In *Rochin v. California*, 342 U.S. 165 (1952), the Supreme Court excluded evidence that was obtained in a manner which shocked the conscience. *But see Irvine v. California*, 347 U.S. 128 (1954).

9. 367 U.S. 643 (1961).

10. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 47-50 (1977), cited in Wilkey, *The Exclusionary Rule: Why Suppress Evidence*, 62 JUDICATURE 214, 220 (1978) (footnotes omitted).

11. This rationale was summarily treated by Justice Brennan in his dissent in *United States v. Calandra*, 414 U.S. 338, 357-58 (1971).

when he wrote that "government officials shall be subjected to the same rules of conduct that are commands to the citizen If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."¹²

The modern rationale for this rule, however, is to deter the police officer from violating the fourth amendment in the first place. "The principle and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again."¹³ Those advocating a contraction of the rule point out the illogic behind such a purpose.¹⁴ Thus, it is here that the battle lines are drawn.

UNITED STATES v. WILLIAMS: DAWN OF THE GOOD FAITH EXCEPTION

In 1976, Jo Anne Williams was arrested in Ohio by DEA Special Agent Paul Markonni for possession of narcotics. She pleaded guilty and was released on bond pending her appeal. As a condition of her bond, she was restricted in travel to the State of Ohio.

On September 28, 1977, Special Agent Markonni was on duty at the Atlanta International Airport. He observed Williams deplane from a flight arriving from Los Angeles.¹⁵

Markonni, aware of her travel restrictions, arrested her for violating those restrictions (i.e., bail jumping). Upon this arrest, Williams' person was searched and a packet of an opiate was discovered. Markonni subsequently obtained a warrant to search Williams' luggage and a large quantity of heroin was discovered.

At trial, Williams made a timely motion to suppress all evidence

12. *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (dissenting opinion).

13. *Wilkey*, *supra* note 10, at 220. See Justice Powell's majority opinion at 414 U.S. at 347. But see Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 338, 416 (1971).

14. *Wilkey*, *supra* note 10, at 214.

15. Agent Markonni was present at this particular location as part of the DEA's Drug Courier Interdiction Program. Flights arriving from Los Angeles were monitored because the city had been identified as a source of illegal drugs carried by couriers. 594 F.2d at 88 n.5.

seized by government authorities. The magistrate denied this motion. The circuit court disagreed and suppressed the evidence.¹⁶ According to the court's interpretation, Special Agent Markonni did not have the authority to arrest Williams.¹⁷ This conclusion was reached despite the fact that Markonni had a good faith belief that his actions were proper.¹⁸ The court reasoned that this decision would serve as a deterrent to other police activity involving bail jumping.¹⁹

Because of the strong dichotomy of feelings on this issue, a major-

16. *Id.* at 91. The court concluded that 18 U.S.C. § 3150 (1976) is violated only for "*the willful failure to appear before any court or judicial officer as required.* (emphasis in original). The mere violation of a *bond condition*, other than a failure to appear as ordered, is not a criminal offense within the meaning of section 3150." (citations omitted) (emphasis supplied).

17. *Id.* at 92. The court declared that 18 U.S.C. § 401(3) (1970) empowered *only* a court to punish disobedience or contempt of its order by fine or imprisonment, and that 18 U.S.C. § 3146 (1970) initiates only judicial authority and empowers a court, not a DEA agent, to determine whether punitive action is warranted. *Id.* The following relevant portions were cited by the court: 18 U.S.C. § 401 (1976) provides: "*A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as . . .* (emphasis in original). (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.* 18 U.S.C. § 3146 provides:

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods or relief, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions; . . .

(2) place restrictions on the travel, association, or place of abode of the person during the period of release

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

18. 622 F.2d at 846. *But see* United States v. Avery, 447 F.2d 978 (4th Cir. 1971), *cert. denied*, 405 U.S. 930 (1972), cited at 594 F.2d at 93.

19. 594 F.2d at 96 n. 18.

ity of the judges in active service granted their own motion to rehear the case *en banc* on briefs and without oral argument.

The *en banc* court reversed with alternative holdings. Although all felt the arrest was valid, ten of the twenty-four judges avoided the exclusionary rule question by concluding that the search and seizure were proper,²⁰ and went no further. However, the majority (13) felt that evidence should not be suppressed "under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief, that they are authorized."²¹ Special Agent Markonni, the court felt, had met this standard.

In coming to this decision, the court relied on the deterrence principle in concluding that "the exclusionary rule exists to deter willful or flagrant actions by police, not *reasonable good faith* ones. Where the reason for the rule ceases, its application must cease also."²² The court restricted the exclusionary rule "to conform . . . to its underlying purpose: to deter unreasonable or bad faith police conduct."²³ This court thus became the first to explicitly articulate a "good faith" exception to the exclusionary rule.

TREND OF THE GOOD FAITH EXCEPTION

Almost from the beginning, legal scholars were aware that the rule had its shortcomings. Justice Cardozo criticized the rule pointing out that "[t]he criminal is to go free because the constable had blundered A room is searched against the law, and the body of a man is found The privacy of the home has been infringed, and the murderer goes free."²⁴

In practice, the rule produced a misguided result; protecting the

20. In Judge Politz's special concurring opinion, the ten judges felt that Williams had willfully breached a court order by violating a condition of her release. Such violation, they reasoned, constituted criminal contempt of court, which is considered a crime.

21. 622 F.2d at 840.

22. *Id.* (emphasis added).

23. *Id.* at 847.

24. *People v. DeFore*, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-88 (1926), cited in *Wilkey*, *supra* note 10, at 221.

guilty rather than the innocent. This sentiment was expressed by Judge Wilkey who stated:

[A] policy of excluding incriminating evidence can never protect an innocent victim of an illegal search against whom no incriminating evidence is discovered. The only persons protected by the rule are the guilty against whom the most serious reliable evidence should be offered. It cannot be separately argued that the innocent person is protected *in the future* by excluding evidence against the criminal now.²⁵

In view of similar feelings that the exclusionary rule was too indiscriminatory in effect,²⁶ a retreat from the rule began to develop. This retreat also reflected the thoughts of those who felt that the deterrent rationale was no longer a plausible reason for the continued enforcement of the rule.²⁷ Justice White spoke of this lack of deterrent effect:

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have *no* deterrent effect. The officers, if they do their duty, will act in a similar fashion in similar circumstances in the future²⁸

The position of those who support the good faith exception is based on the belief that:

[T]he exclusionary rule excludes reliable, probative evidence from the judicial fact-finding process, and thus hampers the determination of the truth. Because exclusion is not a constitutional right, it can and should be employed only where its underlying rationales are served. In cases involving good faith violations, neither deterrence nor the imperative of judicial integrity is positively affected by exclusion. Therefore, a good faith exception should apply to all cases involving good faith mistakes or technical violations.²⁹

25. Wilkey, *supra* note 10, at 223 (emphasis in original).

26. Stone v. Powell, 428 U.S. 465 (1976). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Harlan, J., concurring and Burger, C.J., dissenting).

27. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972).

28. 428 U.S. at 540 (White, J., dissenting) (emphasis added).

29. Ball, *Good Faith and the Fourth Amendment: The "Reasonableness" Ex-*

In light of this criticism of the exclusionary rule, the United States Supreme Court began to respond. However, strong dissents indicated how widely the court was divided on this issue.³⁰ This led to a situation where, in the view of the rule's opponents, progress was very slow.

The first step was the recognition that the exclusionary rule was not a requirement of the Constitution, but rather "a judge-made rule drafted to enforce constitutional requirements."³¹ This vital realization which is sometimes overlooked caused one writer to respond that:

The mystique and misunderstanding of the rule causes not only many citizens but also judges and lawyers to feel (not think) that the exclusionary rule was enshrined in the Constitution by the Founding Fathers, and that to abolish it would do violence to the whole sacred Bill of Rights. They appear totally unaware that the rule was not employed in the U.S. during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule.³²

The next step in the slow process of inhibiting the application of the rule occurred in 1971 when Chief Justice Burger wrote in a dissenting opinion that inadvertent or honest mistakes by the police should not be treated the same as "deliberate or flagrant" violations of the fourth amendment.³³

Several similar dissents followed in which flagrantly abusive violations were distinguished from technical and good faith violations.³⁴ During this period, the Supreme Court was limiting the extent of the exclusionary rule.³⁵ These cases afforded the Fifth Circuit some

ception to the Exclusionary Rule, 69 J. CRIM. L. & CRIMINOLOGY, 635, 654 (1978).

30. See notes 33 and 34 *infra*.

31. 622 F.2d at 841. *E.g.*, 428 U.S. at 482; 414 U.S. at 348.

32. Wilkey, *supra* note 10, at 217 (footnote omitted). See 367 U.S. at 661-62 (Black, J., concurring); 428 U.S. at 482 (1976). *Cf.*, 414 U.S. at 360 (Brennan, J., dissenting).

33. 403 U.S. at 418 (Burger, C.J., dissenting).

34. *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part), 428 U.S. at 538 (White, J., dissenting). See also A MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE, § SS 290.2 (Official Draft, 1975), which states that the evidence shall be excluded only if the violation is substantial.

35. In 441 U.S. 338 (1974), the Court held that a witness summoned to appear

analogous support. Acknowledging these criticisms, as well as the increasingly strong Supreme Court support, the court explicitly recognized the "good faith" exception as the law in their jurisdiction.

PARAMETERS OF THE GOOD FAITH EXCEPTION

In handing down this exception, the court recognized that there are two types of "good faith" exceptions, *technical violations* and *good faith mistakes*, both of which occurred in this case.

A technical violation of the fourth amendment occurs where an officer acts in reliance upon a statute which is later declared unconstitutional, a warrant which is reflected as insufficient, or an interpretation of the law which is subsequently overruled.³⁶ The officer's belief must be *both* bona fide *and* reasonable.³⁷ Since arrests made in good faith reliance on a statute not yet declared unconstitutional are considered valid in the Fifth Circuit,³⁸ evidence of other crimes obtained as a result of searches and seizures made incidental to those arrests is admissible.³⁹ Thus, even though title 18, section 3146 of the United States code was reconstrued by the panel, the court, *en banc*, felt that the officer's reliance was in reasonable good faith and that the evidence should not be excluded.⁴⁰ He had acted under a reasonable belief "and

and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Similarly, in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court admitted evidence obtained as a result of statements taken in complete good faith but without the proper *Miranda* rights. *United States v. Janis*, 428 U.S. 433 (1976), held that the exclusionary rule should not exclude evidence in the civil proceeding of one sovereign which was illegally seized by a criminal law enforcement agent of another sovereign. *Michigan v. DeFilippo*, 443 U.S. 31 (1979), held arrests made in "good faith" reliance that an ordinance is constitutional will not be invalidated if the ordinance is later declared unconstitutional. *Cf. Ybarra v. Illinois*, 444 U.S. 85 (1980), wherein the Court excluded evidence as a violation of the fourth amendment because there was no probable cause.

36. Ball, *supra* note 29, at 641 n.69.

37. See, e.g., 443 U.S. at 38 (1979). See also *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 848 (1976).

38. *Hamrick v. Wainwright*, 465 F.2d 940 (5th Cir. 1972); *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971).

39. 465 F.2d 940; 445 F.2d 287.

40. 622 F.2d at 846.

should not be charged with knowledge that a future panel decision would construe § 3146 to apply only to bond jumping that involved missing a court appearance.”⁴¹

A *good faith mistake* occurs from an officer’s reasonable but mistaken judgment as to probable cause. In *Williams*, the court held that Special Agent Markonni acted under a reasonable, though mistaken, belief as to the probable cause under which he arrested Williams, because he made a “reasonable factual error about an element of the crime.”⁴² The court acknowledged that his good faith and reasonableness were not questioned here.

However, the underlying mandate of the *Williams* decision is clear. Henceforth, in the Fifth Circuit:

[W]hen evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a *reasonable good faith* belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence We therefore . . . [go] no further than to delineate the “exception” itself explicitly and to recognize that where the proponent establishes it, [reasonable good faith] the evidence should be received if otherwise admissible.⁴³

But the court emphasized that this exception will not reward deficient understandings of the law. On the contrary, the court held that the arresting officer’s belief:

[I]n addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulate premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable — no matter how pure in heart — who had never heard of the fourth amendment could never qualify.⁴⁴

41. *Id.*

42. *Id.*

43. *Id.* (emphasis added).

44. *Id.* at 841 n.4a.

The *Williams* court was attempting to draw a fine line in deciding when evidence should be excluded. Keeping the rule's deterrent intentions in mind, the court is seeking to reward the efforts of officers who have acted in reasonable good faith, while punishing the ignorance of officers whose good faith fails to measure up to the objective standards for the profession. The court thus puts a premium on a quality education for field officers so that they will rigidly adhere to the fourth amendment's confines. On those occasions when a mistake occurs, the fruits of arrests based upon reasonable good-faith reliance as to probable cause will not be excluded. In this manner, the court can both deter bad policework and admit evidence which was obtained legally.

CONCLUSION

In coming to this decision, the court has taken a bold stand on a controversial issue. Because of the disparity of views concerning whether to limit the extent of the rule, this issue will come up again. Four current members of the Supreme Court are in favor of the limitation espoused in this case.⁴⁵ Whether this doctrine becomes the law of the land remains to be seen.

This dichotomy was illustrated in the manner in which the court arrived at the decision. Because *all* agreed that the original arrest was valid, ten of the twenty-four felt that the good-faith exception need not have been addressed.⁴⁶ This diversity could immunize this case from Supreme Court review.⁴⁷

Although this doctrine is now the law in this circuit, and in view of the Fifth Circuit splitting, its precedential value will be problematical until the Supreme Court rules affirmatively on this issue.

Joseph R. Dawson

45. See notes 33-35, *supra*. Chief Justice Burger and Justices Powell, White, and Rehnquist have gone on record in support of the good-faith exception.

46. 622 F.2d 848 (Rubin, J., specially concurring).

47. *Id.* at 851.

Criminal Law: Drug Courier Profiles, *United States v. Mendenhall*

The recent United States Supreme Court decision in *United States v. Mendenhall*¹ is notable not for what the Court did decide, but for what the Court could not decide. The case's central issue, the constitutionality of the use of "drug courier profiles" by narcotics agents in airports to stop and search persons suspected of drug trafficking, was left unresolved by a splintered court.

The case reached the Court pursuant to a motion to suppress heroin allegedly acquired through an unconstitutional search and seizure² by Drug Enforcement Administration (DEA) agents. The Supreme Court granted *certiorari* "to consider whether any right of the respondent guaranteed by the [f]ourth [a]mendment was violated."³

In resolving the issues presented in *Mendenhall*,⁴ the Supreme Court reviewed the use by DEA agents of the "drug courier profile," which is an "informally compiled abstract of characteristics thought typical of persons carrying illicit drugs."⁵ According to the DEA, the following conduct is exhibited consistently by drug couriers, and indicates that criminal activity is afoot. A person is suspicious when he:

- (1) arrives on a flight from a source city,⁶
- (2) is the last passenger to deplane,
- (3) is very nervous,
- (4) scans the whole terminal,
- (5) carries or picks up no baggage,

1. — U.S. —, 100 S. Ct. 1870 (1980).

2. *Id.* at 1873.

3. *Id.*

4. *Id.*

5. *Id.* at —, 100 S. Ct. at 1873 n.1. The "drug courier profile" has also been described as a "check list of recurrent characteristics." *United States v. Rico*, 594 F.2d 320, 326 (2d Cir. 1978).

6. The place of origin for controlled substances brought into the airport in which the DEA agents are stationed. — U.S. at —, 100 S. Ct. at 1873; *United States v. Price*, 599 F.2d 494, 496 (2d Cir. 1979).

- (6) changes airlines for a flight out of the airport,
- (7) uses currency in small denominations for ticket purchases,
- (8) remains in the drug import centers, (or the source city) for only a short stopover, and
- (9) uses one or more alias.⁷

Once a DEA agent detects a suspicious person fitting this drug courier profile, the agent approaches the suspect, identifies himself, and asks to see the suspect's identification and ticket. It is this initial stop and questioning which raises the issue of whether any of the suspect's fourth amendment rights have been violated.

The Supreme Court upheld the lawfulness of the initial stop and questioning of Ms. Mendenhall based upon the "drug courier profile."⁸ The majority further found that the subsequent search and seizure of Ms. Mendenhall was lawful and not violative of any constitutionally protected rights because she had voluntarily accompanied the DEA agents to their airport office, and had voluntarily consented and submitted to a strip search revealing the heroin.⁹

*

ISSUES PRESENTED

The majority's opinion, however, did not set forth concise guide-

7. — U.S. at —, 100 S. Ct. at 1873 n.1. *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979). *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979). *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978). *United States v. McCaleb*, 512 F.2d 717 (6th Cir. 1977). It is interesting to note that many of the characteristics of the "drug courier profile" often used to justify an initial encounter or investigatory stop and comprise part of the "reasonable suspicion" cannot be ascertained until after the individual is approached and questioned. For example, the conduct of (1) using one or more alias, (2) remaining in the drug import centers or source cities for only a short stopover and (3) traveling under an unusual itinerary, can be ascertained only after stopping the suspect and asking for his ticket and identification. In such situations, these characteristics cannot contribute to the "reasonable suspicion" that criminal activity is afoot which is necessary to lawfully intrude upon an individual's fourth amendment rights. Some courts, however, have recognized that the information acquired during the investigatory encounter cannot be used to justify it. *United States v. Rico*, 594 F.2d 320, 323 (2d Cir. 1979). *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977). *United States v. Pope*, 561 F.2d 663, 668 (6th Cir. 1977).

8. — U.S. —, 100 S. Ct. 1870.

9. *Id.* at —, 100 S. Ct. at 1879-80.

lines for use in resolving future cases, nor did the Court resolve all of the issues presented in the case. Three questions remain to be answered by the Court. First, whether actions of a passenger, consistent with the "drug courier profile," provide the agents with probable cause to stop, question, and seize the suspect. Second, whether such suspicious conduct supplies the agents with "reasonable suspicion," something less than probable cause, which under the fourth amendment authorizes a minimally intrusive stop and questioning. Third, whether agents can stop and question a suspect whose conduct falls within the purview of the "drug courier profile" without invoking fourth amendment protections.

Thus the question remains: Does the use of the "drug courier profile" (a means of providing agents with a cloak of authority to act on their "hunches") invest the agents with unfettered discretion to intrude on the rights of citizens? Inherent in this issue is the recognition that the conduct compiled in the "drug courier profile" is often logically consistent with innocent behavior, and may result in passengers being unnecessarily detained and their constitutional rights infringed upon to a greater or lesser degree.

Since the majority of the Supreme Court was divided on the issues concerning the initial contact between the federal agents and the suspect, the lower courts will have to address and resolve these questions on a case by case analysis.

FACTS

The fact pattern in *Mendenhall*,¹⁰ played a major role in the Supreme Court's decision. The incident occurred in the Detroit Metropolitan Airport where DEA agents were stationed to detect unlawful narcotic traffic. Two agents observed Ms. Mendenhall as she arrived in the airport and proceeded through the terminal. Ms. Mendenhall's conduct was suspicious insofar as the agents viewed it as being consistent with the characteristics of the "drug courier profile."¹¹

The agents approached Ms. Mendenhall, identified themselves, and asked to see her identification and ticket. Ms. Mendenhall pro-

10. — U.S. —, 100 S. Ct. 1870.

11. *Id.* at —, 100 S. Ct. at 1873-74.

duced a driver's license in the name of Sylvia Mendenhall and an airline ticket issued in the name of Annette Ford, triggering further inquiry by the federal agents.¹²

In response to questioning, Ms. Mendenhall stated she had spent only two days in California. According to the "profile," this factor is indicative of illegal conduct since drug couriers while transporting narcotics often make brief stops in diverse cities. Additionally, when Agent Anderson specifically identified himself as a federal narcotics agent, Ms. Mendenhall became extremely nervous and had difficulty speaking.¹³

Based on Ms. Mendenhall's suspicious conduct, Agent Anderson asked if she would accompany the agents to the airport DEA office for further questioning.¹⁴ The record does not include Ms. Mendenhall's verbal response to this question, but merely recites that she accompanied the agents to the office. Once at the office, an agent asked Ms. Mendenhall if she would permit a search of her person and handbag. She responded, "go ahead."¹⁵ When a policewoman arrived to conduct the search, she asked the agents if Ms. Mendenhall had consented to the search, and the agents said she had. After the policewoman and Ms. Mendenhall had entered another room, the policewoman asked Ms. Mendenhall if she had consented to the search and she replied affirmatively. The policewoman then told Ms. Mendenhall that she

12. *Id.*

13. *Id.* at ___, 100 S. Ct. at 1874. Nervousness is one characteristic of the "drug courier profile" which is often misleading and not indicative of criminal activity. Very often individuals traveling through airports are nervous and confused due to the hectic and unfamiliar surroundings. Government officials acting on their hunches can label conduct as "extremely nervous," thereby fitting it into the profile. Thus the officers can justify approaching almost any individual walking through an airport terminal. An example of detectives acting merely on a hunch occurred in *Berg v. State*, 384 So. 2d 292 (Fla. 4th Dist. Ct. App. 1980), wherein the detectives observed Berg walking through the terminal in an extremely nervous manner. As Berg approached the metal detector he was shaking with an overall appearance of apprehension. Since the detectives viewed this conduct as consistent with the "drug courier profile" they approached and asked to speak with Berg. After receiving permission to inspect his bags, they discovered a white powdery laxative which they proceeded to field test three or four times. In reality, Berg was a diabetic suffering from the preliminary stages of insulin shock. The court found that the detectives were acting upon "nothing more than mere suspicion." *Id.* at 293.

14. ___ U.S. ___, 100 S. Ct. 1870.

15. *Id.*

would have to disrobe, and in response, Ms. Mendenhall stated that she "had a plane to catch."¹⁶ After being assured by the policewoman that there would be no delay if she were not carrying narcotics, Ms. Mendenhall disrobed without further comment. As she was disrobing, Ms. Mendenhall handed to the policewoman two packages from her clothing, one of which appeared to contain heroin. The agents then arrested Ms. Mendenhall for possession of contraband.¹⁷

THE SUPREME COURT'S ANALYSIS

1. *The Fourth Amendment's Applicability*

The Supreme Court began its factual analysis by establishing that Ms. Mendenhall, as she walked through the airport, was protected by the fourth amendment¹⁸ which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and persons and things to be seized.¹⁹

In *Katz v. United States*,²⁰ the Supreme Court held that the fourth amendment protects "people, not places,"²¹ and thus established that the fourth amendment protects more than an "'area' viewed in the abstract."²² The fourth amendment protects what an individual "seeks to preserve as private, even in an area accessible to the public."²³ "[T]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of secret affairs."²⁴ Additionally, the Supreme Court

16. *Id.*

17. *Id.*

18. *Id.* at —, 100 S. Ct. at 1875.

19. U.S. CONST. amend. IV.

20. 389 U.S. 347 (1967).

21. *Id.* at 351.

22. *Id.*

23. *Id.*

24. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

has recognized that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint of interference of others, unless by clear and unquestionable authority of law."²⁵

2. Was There a "Seizure" of Ms. Mendenhall?

After establishing that Ms. Mendenhall was clothed with constitutional safeguards, the Supreme Court turned its attention to whether the actions of the DEA agents violated her constitutional rights. In its analysis, the majority's consensus broke down. Justice Stewart was joined only by Justice Rehnquist in Part II-A of his opinion, which concluded that Ms. Mendenhall was not "seized" since fourth amendment safeguards were not triggered when she was approached and questioned by the DEA agents.²⁶ Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the result, but found that Ms. Mendenhall *was* seized within the meaning of the fourth amendment.²⁷

Justices Stewart and Rehnquist stated their belief that police officers can question people in the street without the officers' conduct falling within the parameters of the fourth amendment as long as the individual being questioned has not been "seized." In this situation, there is "no intrusion upon that person's liberty or privacy as would under the constitution require some particularized and objective justification."²⁸ According to Justices Stewart and Rehnquist when such encounters occur between officials and citizens, the citizens can ignore the

25. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

26. — U.S. at —, 100 S. Ct. at 1873. In *United States v. Elmore*, 595 F.2d 1036, the Fifth Circuit addressed the question of when a seizure occurs in an encounter between police officers and citizens. In its step by step analysis, the court made a refined judgment as to exactly when the seizure occurred. The court concluded that no seizure occurred until the agent took the suspect's ticket to the airline counter to check the suspect's story. The court arrived at this decision since the encounter involved no force, no physical contact, and no show of authority other than when the agents identified themselves as federal law enforcement officials. *Id.* at 1042.

27. *Id.* at —, 100 S. Ct. at 1880.

28. *Id.* at —, 100 S. Ct. at 1876.

questions addressed to them and freely walk away.²⁹

3. *Terry's Guidelines*

Following this premise, Justices Stewart and Rehnquist state that "the distinction between an intrusion amounting to a 'seizure' of the person, and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts in *Terry v. Ohio*."³⁰

In *Terry*, the Supreme Court was dealing with an encounter between a citizen and a policeman on patrol investigating suspicious circumstances. The plainclothes policeman observed two men standing on a corner. One of them walked past some stores and looked specifically into one store window. While on his return to the corner, the man again spied into the same store window, and upon arriving at the corner, the two men again conferred briefly with each other. The second man repeated this routine and peered twice into the same store window. These two men made twelve trips: "pacing, peering, and conferring."³¹ At one point, as the two men were conversing on the corner, they were joined by a third man. After observing these three men for twelve minutes, the police officer was "thoroughly suspicious."³² He approached them, "identified himself as a police officer and asked for their names."³³

The Court stated that "at this point his [the policeman's] knowledge was confined to what he [had] observed. He was not acquainted with any of the three men by name or sight, and he had received no information concerning them from any other source."³⁴

In response to the officer's question, the three men "mumbled something."³⁵ Instantaneously, the officer "grabbed petitioner Terry,

29. *Id.* However, courts have recognized that encounters between citizens and officials often inherently involve restraints on individuals' freedom to freely walk away. The cloak of authority surrounding a government official often results in submission on the part of citizens, who are not free to disregard the demands of officers. *Johnson v. United States*, 333 U.S. 10, 13 (1948). *State v. Frost*, 374 So. 2d 593 (Fla. 3d Dist. Ct. App. 1979).

30. 392 U.S. 1.

31. *Id.* at 6.

32. *Id.*

33. *Id.* at 6-7.

34. *Id.* at 7.

35. *Id.*

spun him around . . . , and patted down the outside of his clothing.”³⁶

In *Terry v. Ohio*, the majority found that the police officer “seized” the petitioner “when he took hold of him and patted down the outer surfaces of his clothing.”³⁷ However, after discussing the circumstances in *Terry*, the Court concluded that the seizure was reasonable despite the interference with Terry’s personal security. Thus, there was no violation of the fourth amendment’s prohibition against unreasonable searches and seizures.³⁸

In *Mendenhall*,³⁹ by simultaneously discussing the majority and concurring opinions in *Terry*, Justices Stewart and Rehnquist suggested that no “seizure” occurs when a police officer questions a citizen on the street, since the Court in *Terry* found that no seizure occurred when the officer stopped and questioned the three men.⁴⁰

However, a careful analysis of the opinions in *Terry* reveals that the majority of the Supreme Court did not decide the issue of whether a “seizure” took place before the officer physically restrained Terry. The majority stated in a footnote:

We thus decide nothing today concerning the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves “seizures” of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a “seizure” has occurred. We cannot tell with any certainty upon this record whether any “seizure” took place here prior to Officer McFadden’s initiation of physical contact for purposes of searching Terry for weapons. . . . ⁴¹

In his concurring opinion in *Terry*, Justice White spoke of interro-

36. *Id.*

37. *Id.* at 9.

38. *Id.* at 30-31.

39. — U.S. —, 100 S. Ct. 1870.

40. *Id.* at —, 100 S. Ct. at 1876.

41. 392 U.S. at 19 n.16. The Fifth Circuit in *United States v. Elmore*, 595 F.2d 1036, analyzed the *Terry* decision concluding that the Court did not discuss the propriety of an investigatory seizure.

gation during an investigatory stop.⁴² The interpretation given this concurring opinion by Justices Stewart and Rehnquist is that since nothing in the constitution prevents a police officer from addressing questions to individuals in the streets, constitutional rights are not violated if a person is briefly restrained and questioned.⁴³

A close analysis of Justice White's separate concurring opinion reveals that he did not state absolutely that no seizure occurs during a brief encounter with a police officer. Rather, he set forth that the individual's constitutional rights were "not necessarily violated."⁴⁴ The majority of the Supreme Court in *Terry* specifically did not decide this issue.⁴⁵

Analyzing encounters between citizens and police officers demonstrates that these contacts involve varying degrees of coerciveness. When a police officer on the beat approaches a citizen and asks, "Sir, may I talk to you a moment,"⁴⁶ the question suggests that the individual is free to leave if he so desires.⁴⁷ On the other hand, when a federal agent in an airport stops a citizen whose conduct is consistent with the "drug courier profile," identifies himself as a DEA agent, and asks for the suspect's identification and ticket, the situation strongly suggests that the individual is not free to leave, and that any attempt to do so would be met with opposition.⁴⁸

In *Mendenhall*,⁴⁹ the record clearly showed that Ms. Mendenhall was not free to ignore the federal agents and walk away. Footnote six of Justices Stewart and Rehnquist's opinion states that the DEA agents would have detained Ms. Mendenhall had she attempted to leave.⁵⁰ The federal agent's subjective intention to restrain the respondent was relevant insofar as it was conveyed to Ms. Mendenhall.⁵¹ Unfortu-

42. 392 U.S. at 34.

43. — U.S. at —, 100 S. Ct. at 1876.

44. 392 U.S. at 35. In fact, Justice White's analysis recognized that the circumstances of an encounter were critical. In *Terry* he agreed that proper circumstances existed to approach and detain the suspect.

45. *Id.* at 19 n.16.

46. *United States v. Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977).

47. *Id.*

48. — U.S. —, 100 S. Ct. 1870.

49. *Id.*

50. *Id.* at —, 100 S. Ct. at 1877 n.6.

51. *Id.*

nately, the record before the Supreme Court did not contain the specifics of the intention conveyed to Ms. Mendenhall. Certainly, the thoughts, beliefs, and motivations of the participants set the atmosphere of any encounter and may affect their actions during it. Thus, if the record had been more complete, perhaps it would have shown that a seizure had occurred. Possibly, a better solution, in a situation where the record is insufficient in cases involving fourth amendment rights, is to remand for further evidentiary hearings on the issue⁵² rather than to assume that no seizure occurred.⁵³

In discussing whether a seizure had occurred during the initial encounter in *Mendenhall*, Justices Stewart and Rehnquist broadly defined "seizure" as "when by means of physical force or a show of authority an [individual's] freedom of movement is restrained."⁵⁴ This definition encompasses circumstances where no physical force or touching occurs and where the suspect makes no attempt to leave. Two examples set forth in Stewart and Rehnquist's opinion include: (1) when the presence of several officers is threatening; and (2) when the language or voice of the officers indicates that the suspect will not be allowed to leave.⁵⁵ In ascertaining whether a "seizure" occurs in such circumstances, Justices Stewart and Rehnquist would consider whether "in view of all the circumstances . . . , a reasonable person would have believed that he was not free to leave."⁵⁶

In *Mendenhall*, Justices Stewart and Rehnquist found that no seizure had occurred during the initial approach since (1) the record did not contain any evidence that Ms. Mendenhall's actions were restrained in any way;⁵⁷ and (2) the record did not indicate that she had any objective reason to believe she was not free to end the conversation and proceed on her way.⁵⁸ Such evidence was absent from the record since the parties had argued the case in the lower courts on the assumption that Ms. Mendenhall had been "seized" when she was ap-

52. *Id.* at —, 100 S. Ct. at 1886 (dissenting opinion). Obviously police can talk to citizens without violating their constitutional rights.

53. *Id.* at —, 100 S. Ct. at 1876.

54. *Id.* at —, 100 S. Ct. at 1877.

55. *Id.*

56. *Id.*

57. *Id.* at —, 100 S. Ct. at 1878.

58. *Id.*

proached in the concourse.⁵⁹

To the concurring justices, the question of whether Ms. Mendenhall had been seized was not resolved easily in light of conflicting precedent.⁶⁰ There is case law supporting a finding that Ms. Mendenhall was seized by the agents. For example, in *Terry v. Ohio*,⁶¹ the Court emphasized that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁶² The Court expanded on this thought, and stated that when a citizen is "stopped" by police he is "seized" within the meaning of the fourth amendment, and some "specific and articulable" justification must be shown to "reasonably warrant" the intrusion.⁶³

In *Brown v. Texas*,⁶⁴ a case which involved the seizure of an individual in circumstances analogous to *Mendenhall*, the Supreme Court noted that when the officers approached Brown and asked him to identify himself, "they performed a seizure of his person subject to the requirements of the [f]ourth [a]mendment."⁶⁵ However, "seizures" of individuals have been found in situations involving less of an intrusion than that which occurred in *Terry*. In *United States v. Coleman*,⁶⁶ the

59. *Id.* at —, 100 S. Ct. at 1875 n.5, 1885 (dissenting opinion).

60. *Id.* at —, 100 S. Ct. at 1880 n.1.

61. 392 U.S. 1.

62. *Id.* at 16.

63. *Id.* at 21.

64. 443 U.S. 47 (1979). In *Brown*, while cruising in a patrol car, two police officers observed Brown and another man walking away from each other in an alley. Believing that the two men either had been together or were about to meet until the patrol car appeared, one officer approached Brown and asked him to identify himself and to explain what he was doing. When Brown refused to identify himself, the officer replied that he was in a "high drug problem area." *Id.* at 48-49. The second officer then frisked Brown and found nothing.

65. *Id.* at 50.

66. 450 F. Supp. 433 (E.D. Mich. 1978). In *Coleman*, a DEA agent observed Coleman as he deplaned at the Detroit Metropolitan Airport, from a flight arriving from Los Angeles, "the most significant distribution point for heroin in the country." *Id.* at 439. Coleman carried no hand luggage and walked directly through the terminal without stopping to claim any baggage. A woman met Coleman outside the terminal and they both proceeded toward the parking lot. The federal agent approached them, identified himself, and asked Coleman to produce some identification and his airline ticket.

The court found from the moment that the DEA agent identified himself and began

District Court for the Eastern District of Michigan stated that police officers can subject an individual to a "seizure" during an investigatory stop by taking advantage of "social pressures which inhibit the suspect from declining to deal with him [the police officer]."⁶⁷ In other words, the suspect is seized because he is not free to ignore the police officer and walk away.⁶⁸

4. *The Concurring Justices Apply a Balancing Approach*

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in part and joined in the judgment. Justice Powell assumed that the initial stop constituted a seizure and analyzed the situation accordingly. The concurring justices stated that they would have held "the federal agents had reasonable suspicion that the respondent was engaging in criminal activity and, therefore, that they did not violate the [f]ourth [a]mendment by stopping the respondent for routine questioning."⁶⁹

In *Mendenhall*, since the stop constituted a seizure it had to be justified in order to satisfy the fourth amendment requirements. The categories of police conduct into which this encounter could fall were limited to (1) an investigatory stop which requires reasonable suspicion; or (2) an arrest or its equivalent which requires probable cause.⁷⁰

to ask Coleman questions, a "Terry stop had been effected." Therefore, the stop had to be based on reasonable suspicion to meet the requirements of the fourth amendment. The court held that the stop of Coleman was not based on reasonable suspicion of criminal activity and was not constitutionally valid.

67. *Id.*

68. *Id.*

69. — U.S. at —, 100 S. Ct. at 1880.

70. *Dunaway v. New York*, 442 U.S. 200 (1979). The bulk of the lower court cases have found that investigatory stops merely based on conduct consistent with the "drug courier profile" cannot be justified on either probable cause or reasonable suspicion grounds. *United States v. Rico*, 594 F.2d 320. *United States v. Ballard*, 573 F.2d 913. *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977). *State v. Battleman*, 347 So. 2d 637 (Fla. 3d Dist. Ct. App. 1979). *State v. Frost*, 347 So. 2d 593. However, there are a few cases that state that there may arise a set of facts in which the existence of profile characteristics constitute reasonable suspicion to warrant the intrusion of an investigatory stop. *United States v. McCaleb*, 522 F.2d 717, 720. *State v. Mitchell*, 377 So. 2d 1006, 1008 (Fla. 3d Dist. Ct. App. 1979).

In *Terry v. Ohio*,⁷¹ the Court established that reasonable investigatory stops satisfy the fourth amendment's proscription against unreasonable searches and seizures. The Court concluded that the warrant clause could not apply, as a practical matter, to police conduct which is "necessarily swift action predicated upon the on the spot observations of the officer."⁷² However, the Court emphasized that police must obtain warrants for searches and seizures whenever practicable.⁷³

In assessing the reasonableness of seizures which are less intrusive than traditional arrests, courts have used a "balancing test" to assure that the individual's reasonable expectation of privacy is not arbitrarily intruded upon by police officers⁷⁴ "engaged in the often competitive enterprise of ferreting out crime."⁷⁵ Whether a stop constitutes a seizure turns on the circumstances of each case. Some of the factors considered by courts when determining the reasonableness of a "seizure" include: "(1) the public interest served by the seizure, (2) the nature and scope of the intrusion, (3) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise,"⁷⁶ and the individual's right to personal security and privacy.⁷⁷

The balancing test applied to fourth amendment issues originated in *Camara v. Municipal Court*.⁷⁸ In that case, the Court was dealing with the warrant provision of the fourth amendment and the quantum of evidence necessary to secure a warrant on less than probable cause. The Court proceeded to apply a "reasonableness" test to this fourth amendment activity by balancing the "need to search against the invasion which the search entails."⁷⁹

This balancing test to determine reasonableness of warrants under the fourth amendment was subsequently applied in *Terry v. Ohio*⁸⁰ to a

71. 392 U.S. 1.

72. *Id.* at 20.

73. *Id.*

74. *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignion-Prince*, 422 U.S. 873 (1975).

75. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

76. — U.S. at —, 100 S. Ct. at 1881.

77. 443 U.S. at 50-51; 440 U.S. at 654-55; 422 U.S. at 879-83; 392 U.S. at 20-22.

78. 387 U.S. 523 (1967).

79. *Id.* at 536-37.

80. 392 U.S. 1.

"confrontation on the street between [a] citizen and [a] policeman investigating suspicious circumstances,"⁸¹ involving less than probable cause. As the majority in *Terry* read the fourth amendment, it prohibited "not all searches and seizures, but unreasonable searches and seizures."⁸² The Supreme Court went on to state that "the central inquiry under the fourth amendment is reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."⁸³ The Supreme Court then applied the "balancing test" to determine the reasonableness of the policeman's conduct in stopping and frisking the suspect and found that the officer was acting upon reasonable suspicion that criminal activity was afoot, thus justifying the intrusion into the individual's constitutionally protected rights.⁸⁴

The concurring justices in *Mendenhall*,⁸⁵ applied this balancing test. First, the justices found a great public interest in detecting individuals involved in drug trafficking, a great problem "affecting the health and welfare of our population."⁸⁶

Second, the Court considered the DEA's "nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States"⁸⁷ and found it to be a well-planned and effective federal law enforcement program."⁸⁸ The justices stated that the special training, experience and expertise of law enforcement officials are factors to be weighed in determining the reasonableness of the stop.⁸⁹ The agents' "expertise" considered important by the concurring justices, included the use by the agents of the "drug courier profile . . . [describing] characteristics generally associated with narcotics traffickers"⁹⁰ compiled through the DEA's highly specialized operation.⁹¹ The justices stated that an agent's "knowledge

81. *Id.* at 4.

82. *Id.* at 9.

83. *Id.* at 19.

84. *Id.* at 30.

85. — U.S. at —, 100 S. Ct. at 1880.

86. *Id.* at —, 100 S. Ct. at 1880.

87. *Id.*

88. *Id.* at —, 100 S. Ct. at 1883.

89. *Id.*

90. *Id.* at —, 100 S. Ct. at 1881.

91. *Id.* at —, 100 S. Ct. at 1881, 1883.

of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices"⁹² are among the circumstances that can give rise to reasonable suspicion.⁹³ "Law enforcement officers may rely on the 'characteristics of the area,' and the behavior of a suspect who appears to be evading police contact."⁹⁴ Further, "a trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'"⁹⁵

Third, the justices reviewed the factors which led to the stop and questioning of Ms. Mendenhall, including that she:

- (1) appeared very nervous,
- (2) attempted to evade detection,
- (3) deplaned after all the other passengers,
- (4) scanned the terminal,
- (5) walked " 'very, very slowly' "⁹⁶
- (6) claimed no baggage, and
- (7) changed airlines for the flight out of Detroit.

The district court held that this conduct, observed by the DEA agents before stopping and questioning Ms. Mendenhall, provided reasonable suspicion to make the investigatory stop. The concurring justices agreed with this conclusion.⁹⁷

The conduct observed by the DEA agents was consistent with the "drug courier profile." In this case, reliance on this profile demonstrated reasonable suspicion. However, the justices pointed out that each case must be "judged on its own facts."⁹⁸

Finally, the Court evaluated the intrusion upon Ms. Mendenhall's rights and found it to be minimal considering that: (1) two plainclothes agents approached the respondent in a public area; (2) the agents identified themselves; (3) the agents asked the respondent to produce some identification and her airline ticket; and (4) the agents asked a few

92. *Id.* at —, 100 S. Ct. at 1882.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at —, 100 S. Ct. at 1883.

98. *Id.* n.6.

brief questions.⁹⁹

In summary, on the issue of the initial encounter between the agents and Ms. Mendenhall, the members of the Court only agreed that the stop was lawful. Justices Stewart and Rehnquist found that there was no seizure, while Justices Powell, Burger and Blackmun assumed there was a seizure but found that it was based on reasonable suspicion.

PRECEDENTIAL VALUE

What does this decision offer to the lower courts as precedent? How does the Supreme Court answer the following questions confronting the lower courts?

(1) Is a suspect who is approached by federal agents in an airport for questioning because his conduct is consistent with the "drug courier profile" seized within the meaning of the fourth amendment? Justices Stewart and Rehnquist said "no;" Justices Powell, Burger and Blackmun did not discuss the question.

(2) Is an initial stop lawful? The majority of the Court said "yes."

(3) Why is the initial stop lawful? Justices Stewart and Rehnquist found that the fourth amendment provides no protection to individuals who have not been "seized." Therefore, since Ms. Mendenhall was not "seized," the stop was outside the parameters of the fourth amendment, and legal. Justices Powell, Burger and Blackmun found that the seizure was based on reasonable suspicion, satisfying the fourth amendment. Thus, the Court's decision on these issues supplies the lower courts with no more guidance than they had previously. Subsequent decisions of the Supreme Court have not addressed these unresolved issues, nor provided the lower courts with any additional guidance.

99. *Id.* at ___, 100 S. Ct. at 1882. However, the opinion did not state whether the DEA agents returned to Ms. Mendenhall her identification and airline ticket before asking if she would accompany them to the airport DEA office. The Fifth Circuit has held that a seizure occurs when the agents take the suspect's ticket. 592 F.2d 1036. Logically, an individual is not free to proceed on his own way when he has no ticket and no identification. If the facts were to establish that the agents kept the documents, Justices Stewart and Rehnquist should have found a seizure of Ms. Mendenhall at that instant.

In a *per curiam* opinion in *Reid v. Georgia*,¹⁰⁰ the Supreme Court did not consider whether an investigatory stop based on the "drug courier profile" constituted a seizure within the meaning of the fourth amendment. The state court had not analyzed the issue but had assumed that a routine identification stop and questioning constituted a "seizure."¹⁰¹

The Supreme Court disposed of the case on its facts, concluding that "the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of [the] observed circumstances,"¹⁰² which were "too slender a reed to support a seizure."¹⁰³ Therefore, the DEA agent did not *lawfully* seize Mr. Reid.¹⁰⁴

MS. MENDENHALL'S "CONSENT" TO BE SEARCHED

In *Mendenhall*,¹⁰⁵ after the majority found that the initial stop and questioning of Ms. Mendenhall was lawful, it still had to determine whether she had consented to accompany the federal agents to the airport DEA office, and whether she subsequently had consented to a search of her person. If voluntary consent is found to have been given by an individual capable of consenting, then such a search, limited to the scope of the consent, is reasonable under the fourth amendment.¹⁰⁶ Voluntary consent eliminates the necessity for justifying the search with a warrant or probable cause. In a situation where the prosecution relies upon "consent" to justify a search, the prosecution has the burden of proving that the consent was voluntary,¹⁰⁷ and voluntariness must be determined by the totality of the circumstances.¹⁰⁸

The district court had found that Ms. Mendenhall had voluntarily accompanied the agents to the DEA office in the airport, and her vol-

100. — U.S. —, 100 S. Ct. 2752 (1980).

101. *Id.*

102. *Id.* at —, 100 S. Ct. at 2754.

103. *Id.*

104. *Id.*

105. — U.S. —, 100 S. Ct. 1870.

106. *Scheneckloth v. Bustamonte*, 412 U.S. 218 (1973).

107. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

108. 412 U.S. 218.

untary action thereby eliminated the need for probable cause.¹⁰⁹

The majority of the Court, in reviewing the evidence before the trial court which included no show of force or threats, found that "the totality of the evidence . . . was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers" ¹¹⁰

Finally, the Court considered whether the respondent's consent to the search was "valid." The majority found ample evidence to support a finding that the consent was voluntary and valid, including: (1) the respondent was twenty-two years old with an eleventh grade education; (2) she was expressly told twice she was free to refuse consent; and (3) she twice "unequivocally" consented to the search.¹¹¹

CONCLUSION

The Supreme Court's objective in granting *certiorari* was to consider "whether any right of the respondent guaranteed by the [f]ourth [a]mendment was violated."¹¹² Since the majority found that the initial stop was lawful, and not violative of any of Ms. Mendenhall's rights under the fourth amendment, the Court accomplished its goal. However, the lower courts must still deal with conflicting analyses and rationales upon which to base future decisions involving investigatory stops based on less than probable cause such as that supplied by the "drug courier profile."

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109. — U.S. at —, 100 S. Ct. at 1879.

110. *Id.*

111. *Id.* at —, 100 S. Ct. at 1879-80.

112. *Id.* at —, 100 S. Ct. at 1873.